Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS
AND ADVISERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Congress prescribed in the Cable Communications Policy Act of 1984 a comprehensive scheme allocating the responsibility for regulation of cable television services among federal, state, and local agencies –

(1) Whether Congress delegated to the FCC the authority to curtail local regulatory responsibilities by non-literally interpreting the plain terms of the Act defining the scope of regulation assigned to the local governments and not to the FCC;

(2) Whether the court of appeals erred in affirming the FCC's construction of key statutory definitions so as to allow a significant portion of the cable industry to escape totally any regulation under the Cable Act by any governmental agency.

PARTIES TO THE PROCEEDING and CORPORATE DISCLOSURE STATEMENT

(Rules 14.1[b] and 29.6)

Petitioners are:

National Association of Telecommunications Officers and Advisors (NATOA)
City of East Lansing, Michigan
Charter Township of Meridian, Michigan
Michigan Coalition to Protect Public Rights of Way from Telecommunications Encroachment (PROTEC)
Texas Coalition of Cities for Utilities Issues (TCCFUI)
City of St. Louis
Greater Metro [Denver] Telecommunications Consortium
Alliance for Communications Democracy
Alliance for Community Media
Chicago Access Corporation.

Additional parties appearing before the U.S. Court of Appeals for the Seventh Circuit were:

National Cable Television Association
Michigan Cable Telecommunications Association
City of Chicago
Federal Communications Commission
United States of America
21st Century Telecom Group
Entertainment Connections Incorporated

RCN Telecom Services
Wedgewood Communications.

With three exceptions the joint petitioners are local governments or associations of local governments or government officials. The local governments are franchising authorities as defined in Section 602(10) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 522(10). The Alliance for Communications Democracy, the Alliance for Community Media, and Chicago Access Corporation are non-profit organizations associated with the use of public, educational, and governmental (PEG) access channels provided by cable operators pursuant to local franchises under Section 611 of the Cable Act, 47 U.S.C. § 531. None of the joint petitioners has a parent corporation within the meaning of Rule 29.6.

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OPINIONS BELOW

The decision of the Federal Communications Commission in Entertainment Connections, Inc. (FCC 98-111), released June 30, 1998, is reported at 13 F.C.C. Rcd 14277 and 12 P&F C.R. 800. App. A-27.

The decision of the Seventh Circuit, dated December 7, 1999, in City of Chicago, et al., v. Federal Communications Commission and U.S., No. 98-2729, etc., as amended, is reported at 199 F.3d 424. App. A-1.

The per curiam order of the Seventh Circuit denying rehearing, dated March 22, 2000, is reported at 18 P&F C.R. 1044. App. A-108.

BASIS OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 7, 1999, and the petitions for rehearing and rehearing en banc were denied on March 22, 2000. The Court has jurisdiction under 28 U.S.C. § 1254.

STATUTE INVOLVED

This case involves the Cable Communications Policy Act of 1984, 98 Stat. 2779, as amended by the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460, and the Telecommunications Act of 1996, 110 Stat. 56. The 1984 Act became Title VI of the Communications Act of 1934, as amended, and has been codified to 47 U.S.C., ch. 5, Subchapter V-A.

Section 601 (Purposes); subsections (2), (5)-(7), (10), (15), (18), and (20) of Section 602 (Definitions), and subsections (b), (c), and (e) of Section 621 (General Franchise Requirements), as amended; and Section 636 (Coördination of Federal, State, and Local Authority) of the Cable Act, 47 U.S.C. §§ 521; 522(2), (5)-(7), (10), (15), (18), and (20); 541(b), (c), and (e); and 556, are printed in the appendix to this petition. In addition, subsection (7) of Section 602, as originally enacted as subsection (6) in 1984, is printed following subsection (7), as amended in 1996.

STATEMENT OF CASE

This case arises from a declaratory ruling by the Federal Communications Commission interpreting one section of the Cable Act in 1984 in disregard of plain meaning in a way that both threatens the regulatory efficacy of the remainder of the Act and radically

affects Congress' allocation of responsibilities among Federal, state, and local units of government in connection with the regulation of cable television.

The 1984 Act Allocated Regulatory Responsibilities. Cable television became a significant factor in the distribution of video programming well after enactment of the Communications Act of 1934, which understandably made no provision for the regulation of the operators of cable television systems. Cable television systems were regulated unevenly by the local franchising authorities, and by the Federal Communications Commission by virtue of its power over television broadcast signals. H. Rpt. 98-934 to accompany H.R. 4103 (The Cable Franchise Policy and Communications Act of 1984) at 19 ff (1984). Feeling that existing regulation was unfairly inhibiting the growth and development of cable, Congress enacted the Cable Communications Policy Act of 1984 "to ... provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems." Id. at 22; see also Section 601 (Purpose), 47 U.S.C. § 521, particularly subsections (1) and (3), printed at App. A-111.

The thrust of the 1984 Act was protecting cable subscribers, who had access to only a single provider of cable service, while at the same time reducing the regulatory burden on cable operators by rationalizing their regulation at the Federal and local levels. Id. at 23-24. The strategy employed in the Act was to pre-empt all federal, State, and local regulation of rates, services, facilities, and equipment provided by a cable

operator "except to the extent consistent with [the Act]." E.g., Sections 623(a) and 624(a), 47 U.S.C. §§ 543(a), 544(a).

Structure of the Act. The definition of "cable operator" was pivotal in the operation of the Act to the extent that the protection of, and the burdens on, cable by the Act were expressed in terms of effect on the "cable operator." "Cable operator" was defined in Section 602(5), 47 U.S.C. § 522(5), to mean

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

A "cable system," in turn, was defined in Section 602(7), 47 U.S.C. § 522(7), as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community...

with certain enumerated exceptions, one of which is the SMATV (satellite master antenna system) or so-called "private cable" exception that in prior form was

the subject of this Court's decision in FCC v. Beach Communications, 508 U.S. 307 (1993).

One arrangement of particular significance to the viability of the Commission's analysis was the treatment of "channel service" established under prior Commission regulations and recognized in the Cable Act. Under "channel service," a telephone company builds facilities and leases them to cable operators to provide cable service to the home. The Commission has consistently required operators providing cable service via channel service to obtain a franchise.

ECI's Petition. Faced with demands to obtain local franchises from the two municipalities in which it operated, ECI petitioned the FCC for a declaratory ruling that its system providing cable service to twenty apartment buildings in East Lansing and Meridian Township from a single headend[1] was not required by federal law to have a local franchise. Section 621(b) of the Act, 47 U.S.C. § 541(b), enforces Congress' allocation of regulatory responsibility to the localities by prohibiting a cable operator from "provid[ing] cable service without a [local] franchise." ECI had used separate head-ends in each building until it bought

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[1] The prior configuration of ECI's operations, using head-ends in each apartment building, had been held to be subject to franchising under Michigan law. Meridian Charter Twp. v. Roberts, 114 Mich. App. 803, 319 N.W.2d 678 (1982), aff'd on reh'rg, 324 N.W.2d 339 (1982). The Commission disclaimed any intent to rule whether ECI required a franchise or not under state law. Order at ¶ 66 (App. A-86).

wideband transmission service from AMERITECH, the local telephone company, which AMERITECH explicitly advertised as a device for avoiding the federal franchising requirement. The new arrangement was identical in all pertinent respects to channel service, and the local franchising authorities had accordingly demanded that ECI obtain a local cable franchise.

The FCC's Declaratory Ruling. The FCC — over the vigorous dissent of Commissioner Tristani — held that, while ECI was undeniably providing "cable service" within the meaning of Section 602(6), 47 U.S.C. § 522(6), ECI was not a cable operator. The majority reasoned (1) that ECI's system was not a cable system, because it was not wholly owned by ECI within the meaning of Section 602(7), and (2) that ECI was not a cable operator, because it neither owned nor controlled its whole system. In addition, the majority held that ECI's system fell within the SMATV exemption, because the lines laid in the streets to interconnect the apartment buildings were not "using any public right-of-way" within the meaning of Section 602(7)(B). The separate statement of the majority acknowledged that the decision "highlights important issues surrounding dual federal-local jurisdiction under the Communications Act" but said that its result advanced the Commission's commitment to "competitive opportunity". App. A-94.

Recognizing that exempting ECI's system from the Cable Act would open the door for other *de facto* cable operators avowedly providing cable services to

escape regulation, Order at ¶ 3 (App. A-2[illegible]), the Commission purported to limit the sweep of its exemption to so-called "purple cow"[2] systems possessing seven factual characteristics not enumerated in the statute. Order at ¶ 73 (App. A-91).

Commissioner Tristani's dissent charged that the majority's "decision is wrong as a matter of law and misguided as a matter of policy." App. A-95. She first explained why the statutory language did not validate the result reached by the majority. App. A-95-105. On policy grounds the decision, she continued, "upsets the careful regulatory balance struck by Congress in the ... Act" and "undermines the vital franchising role that Title VI reserves for local governments." App. A-106. The majority's departure from the statutory definitions "poses a substantial risk of unintended consequences" and led to her "fear that the majority has opened a Pandora's box" by exempting ECI from regulation under the Cable Act. App. A-95. "Telephone companies, incumbent cable operators and others", she wrote, have already expressed an interest in "artificially restructur[ing] their ownership arrangements to evade Title VI regulation." App. A-107.

The Seventh Circuit's Split Decision. Petitions for review were filed in various circuits by parties to the FCC proceeding, and the cases were consolidated in the Seventh Circuit pursuant to 28 U.S.C. § 2112(a)(5). Cf. order on reconsideration, App. A-8.

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[2] After G. Burgess: The Purple Cow (1895).

The agency order was affirmed by a panel consisting of Circuit Judges Bauer, Rovner, and Evans. App. A-25-26. Writing for the majority, Judge Evans found the Commission's interpretation of Section 602(5) and (7), 47 U.S.C. § 522(5) and (7), to be entitled to deference and "is [the interpretation] which we are now convinced we would arrive at ourselves." App. A-8. Judge Rovner, dissenting, concluded that "the statutory language [is] so plain as to foreclose the FCC's rationale and conclusion." App. A-18.

ARGUMENT

I. THE AGENCY's CONSTRUCTION OF THE STATUTE PRODUCES A RESULT CONGRESS WOULD NOT HAVE INTENDED.

The effect of the Commission's ruling is to exempt a large subclass of wireline cable operators from regulation under the Cable Act of 1984, thus withdrawing regulatory protection from a potentially large body of subscribers to functionally equivalent cable services. Under the Commission's interpretation a cable operator may simply elect, by a sleight-of-hand placing the ownership of a transparent portion of his transmission path in the hand of a non-affiliate — or even an affiliate[3] — to exempt the total operation of his system from regulation under the Cable Act.

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[3] Ignoring the definition of "affiliate" in Section 602(2), the Court in City of Austin v. SWBV, 1998 U.S. Dist. LEXIS 16332, *24 (W.D. Tex. July 31, 1998), aff'd 193

The Commission itself recognized in paragraphs 3 and 4 of its order, App. A-29, the "significant additional consequences" to federal regulation that would attend upon operators such as ECI not being classified as cable operators. They would not be "obligated to comply with the requirements of Title VI of the Communications Act" and the Commission's rules concerning, "*inter alia*, mandatory carriage of television broadcast signals, nonduplication protection and syndicated exclusivity, cable television access and technical standards, and equal employment opportunity requirements," as well as leased access (§ 612) and consumer protection and customer service (§ 632).

But the Commission seemed oblivious to the effect of its order on the regulatory responsibilities consigned by Congress to the local governments under the Cable Act. Lying beyond the Commission's regulatory jurisdiction under the Act, such operators would not be subject to Section 611 and 621(b)(2)(B) allowing local franchising authorities to set aside channel capacity for educational, public, governmental, and other broad categories of video programming and to prohibit redlining of the less lucrative residential areas (§ 621[a][3]).

F.3d 309, n.8 (5th Cir. 1999), cert. denied, 120 S. Ct. 1708 (2000), effectively exempted Southwestern Bell Video from the 1984 Act by reason of its taking video transmission service from its sister-subsidiary Southwestern Bell Telephone Company, thereby rejecting the FCC's first "purple cow" condition. Order at ¶ 73 (App. A-91).

As Commissioner Tristani put it:

> [T]oday's decision undermines the vital franchising role that Title VI reserves for local governments. Under Title VI, local franchising authorities can ensure that the needs of their particular communities are met, such as requiring that all neighborhoods be served and that capacity for PEG access be provided. We should not lightly deprive local governments of the ability to protect their communities in this regard, and certainly not without a fuller analysis than is presented here.

App. A-106.

By effectively exempting functional cable operators from the 1984 Cable Act, the Commission radically diminished the regulatory responsibilities assigned to the local governments under that Act. To whatever extent the Commission may have discretion to forbear regulating cable operators within its *own* regulatory responsibilities under the Act, the Commission lacks delegated authority to reach over the inter-governmental boundary prescribed by statute so as to exempt cable operators from the regulatory authority assigned to the local governments under the statutory scheme adopted by Congress, merely because it believes doing so *might* promote competition. Congress was at least as ardent — and certainly more specific — about the regulatory rôle of the local

franchising authorities than it was about the rôle of competition in regulating the cable industry.

From 1984 to 1996 Congress actually made explicit choices as to the way in which competition would proceed. The radical restructuring of Title VI which the Commission's order indirectly produces is not one that Congress contemplated. As Commissioner Tristani put it in her dissent,

> [T]oday's decision upsets the careful regulatory balance struck by Congress in the Communications Act. The Act establishes several distinct methods for entering the video marketplace, each with its own specific benefits and obligations. Even under the "reduced regulatory burdens" of the open video system ("OVS") model, [23/] Congress imposed various Title VI obligations including must-carry, PEG and the payment of a gross revenue fee to local authorities. ECI, by contrast, will have virtually all of the benefits of being a cable or OVS operator with none of the Title VI obligations. Regardless of how much we want to promote competition in the multichannel video marketplace, we cannot do so by creating loopholes in the regulatory scheme created by Congress.

[23/] *See* S. Rep. 104-230, 104th Cong. 2d Sess. at 177 (Feb. 1, 1996).

App. A-106.

II. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT PERMIT THE RESULT REACHED BY THE COMMISSION.

The interpretations that the Commission and the court below placed on the Act's definitions are not sustainable by reference to the text of the statutory definitions. There is no suggestion that Congress intended that the Commission or the courts elaborate on – and, indeed, contradict – the definitions crafted in Section 602 of the Act. 47 U.S.C. § 522.

The Commission and, in turn, the panel majority reached an incorrect result by in effect reading a non-existent "total ownership" requirement[4] into the definition of "cable operator" and "cable system" in Section 602(5)(A). If a facility is not wholly owned by one entity, the Commission said, it is not a cable system; and, likewise, if it is not owned from end-to-end by a single entity, there is no entity that "owns a significant interest in such cable system" or that can be considered responsible "for, through any arrangement" the "management and operation" of the system. Congress had in mind more functional definitions. The common root of the interpretational errors was a failure to recognize that, for Cable Act

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[4] That is, "owns a significant interest ..., or ... otherwise controls or is responsible for ... such a cable system". Section 602(5) (defining "cable operator").

purposes, ECI delivered cable services over a single unified and dedicated "system," defined as a unitary assembly of facilities in Section 602(7) using the public rights-of-way. The reference to "arrangements" and "significant interest" in the statutory definition of "cable operator," and the absence of a "unitary ownership" requirement in the definition of cable system make it plain that no such "total ownership" requirement was intended.

A. ECI Operated a "Cable System."

In its decision, the FCC concluded that ECI is not a cable operator within the meaning of Section 602(5) because it does not provide service through a cable system. Order at ¶ 61, App. A-80-81. The Act defines a "cable system" as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community....

Section 602(7). As Judge Rovner explained, neither the FCC, nor the panel majority, nor any party to this case has denied that ECI delivers cable service over a facility that have those characteristics. Instead, the FCC found that ECI did not provide cable service over a cable system because the parts of the system owned by ECI and the part owned by the telephone company

"do not constitute a single, integrated" system. Order at ¶ 61, App. A-80. Section 602(7) requires only that the set of closed transmission paths be "associated" with the signal generation, reception, and control equipment. The FCC did not apply the actual language of subsection (7)'s definition of a "cable system" to ECI, and the majority opinion below overlooked this defect in the FCC's analysis.

The panel majority found that the FCC reasonably relied upon seven factors to conclude that ECI did not provide cable service over a cable system:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.

Op. cit. at A-13-14, quoting Order at ¶ 73, App. A-91. These seven factors do not come from, and are not related to, the statutory definition of "cable system." Instead, most of these factors merely reflect that ECI

does not own the cables located in the public rights-of-way that it uses. But as Judge Rovner so clearly explained:

> The fundamental flaw in the FCC's analysis is that it seizes upon ownership of the transmission lines and elevates that consideration to preeminence in determining whether or not a "cable system" exists. Congress, by contrast, directed the FCC to look at whether there is a set of closed transmission paths and associated equipment that delivers cable service to subscribers; nowhere in the statutory definition did it mention ownership of the transmission paths--or any other particular system component--as a relevant factor.

App. A-21-22.

Moreover, the other factors – the ones that do not concern ownership – editorial control over the programming, the capacity to serve other providers, and ECI's commitment to make its drops available to other programming providers – are not relevant to the statutory definition of a "cable system" either. All the definition requires is "a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service ..." Neither the FCC nor the panel majority applied this definition to ECI's system. Had they done so, they would have been compelled to conclude that ECI does provide cable service through a cable system,

because the system through which it provides service is a set of closed transmission paths with associated signal generation, reception, and control equipment. The Commission simply took it upon itself to rewrite the statutory definition – a power which Congress did not delegate to the agency.

The panel majority did recognize that there is no language in the statutory definition of a "cable system" that makes ownership of the components of that system relevant. App. A-14 ("[I]t is reasonable for the FCC to decline to read the related provisions regarding 'cable operator' and 'cable system' in splendid isolation from one another.") But no other language of the statute refers to a single, integrated system. That concept appears nowhere in the statute. When Congress articulates a standard – here merely requiring signals generators, reception, and control equipment to be "associated" with each other – surely an agency is obliged to apply the statutory test, not one of its own devising. Particularly is this so where the ownership of the system is functionally transparent to the subscriber, who – after all – was the object of concern of the legislative body. See Section 601(4).

The majority's decision ignores the obvious point that neither the statute nor the FCC had ever made unity of ownership the *sine qua non* of franchising. Under channel service, where the facility was owned by a local exchange carrier, the entity providing cable service was required to obtain a franchise; there is nothing in the FCC decision or the decision of the court below that would allow one to

rationally distinguish between the ECI arrangement and a channel service arrangement.

What is worse, and what makes it critical for this Court to review the case, is that factors that the Seventh Circuit majority found critical to upholding the FCC decision, and the factors that the FCC said were critical to its decision, have been rejected by another appeals court in City of Austin v. SWBV, 193 F.3d 309 (5th Cir. 1999), cert. denied, 120 S. Ct. 1708 (2000). But if the factors the FCC exempted ECI from franchising are irrelevant (as the Austin decision suggests), then the obvious conclusion is that the ECI case was wrongly decided.

B. ECI is a "Cable Operator."

Had the FCC applied both the statutory definitions of a "cable system" and "cable operator," the plain language of the statute would have compelled the result that ECI is a cable operator operating a cable system. As we explain above, under the plain language of the Act, ECI provides cable service through a cable system because it provides its service through a set of closed transmission paths and associated signal generation, reception, and control equipment. The Communications Act defines "cable operator" as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or

(B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

Section 602(5). While the panel majority found ambiguity in what is required for ownership of a significant interest in or for control or management of the system, App. A-13, the FCC never even purported to be interpreting those terms. None of the FCC's seven factors purports to define either a "significant interest" in a cable system or what amounts to control or responsibility "through any arrangement."

Moreover, as Judge Rovner set forth so well, ECI qualifies as a "cable operator" under both prongs of the definition: it both "owns a significant interest" in the cable system at issue and "controls or is responsible for, through some arrangement, the management and operation of ... a cable system" Section 602(5). See App. A-18-19. ECI plainly owns a significant interest in the cable system through which it delivers cable service to its subscribers. As Judge Rovner noted, it "owns the 'headend,' where the video signals are first received, and at the other end of the system it owns the junction boxes and interior building drop lines whereby the signals are distributed to subscribers in the multiple dwelling units that ECI serves." App. A-19. Judge Rovner succinctly summarized this point: "There would be nothing to transmit over Ameritech's lines (and of course nothing to receive from those lines) absent the system components that ECI owns. In that sense, it defies

logic to characterize ECI's interest as anything but 'significant.'" Id.

In addition, ECI plainly satisfies the second prong of the definition. It has entered into an agreement with AMERITECH to use AMERITECH's fiber optic cables located in the public right of way to deliver cable service form the headend equipment ECI owns to the junction boxes and drop lines it owns. The statutory definition could not be broader — it requires only that ECI control or manage the cable system "through any arrangement." Section 602(5). Plainly, ECI controls and manages the entire cable system — it owns everything but the transmission lines and has an arrangement with AMERICTECH by which it obtains the use of those lines as well. The facilities owned by AMERITECH in the public rights-of-way are transparent to the cable subscriber. As Judge Rovner noted, ECI has assembled components of a functioning cable system by owning a part of it and leasing a part of it. ECI is responsible to its subscribers. It has entered into an arrangement with AMERITECH to secure the use of a strand of cable to deliver its cable service from the locations it specifies to the locations it specifies, and it relies upon AMERITECH to provide the service it needs to operate its system. Provision of this service is not left to AMERITECH's discretion; rather, it is subject to the arrangement ECI has with AMERITECH. Judge Rovner persuasively concludes that "there can be little doubt .... that ECI, is 'responsible' — partly through ownership and party through leasing — for the system that delivers cable programming to its subscribers." App. A-19.

C. ECI's Cable System, being a "Facility" that Uses the Public Rights-of-Way, is Not Within the "Private Cable" Exclusion.

The FCC also failed to apply the plain language of the statute when it concluded that ECI fell within the so-called private cable exemption to the definition of "cable system." Section 602(7)(B) of the Communications Act exempts from regulation as a cable system "a facility that serves subscribers without using any public right-of-way." The FCC concluded that ECI fell within this exemption because it found that AMERITECH, not ECI, installs, repairs and maintains the cables located in the public right-of-way. See Order at ¶ 62, App. A-81. But the statute requires only that the entity "use" the public right-of-way, not that it install, repair, or maintain equipment located in the public right-of-way. And Judge Rovner aptly pointed out that the statute does not even ask whether the cable provider uses the public right-of-way, but rather whether the "facility" uses the public right-of-way. App. A-23. Here the facility that delivers ECI's cable service to its subscribers includes the fiber optic cable leased from AMERITECH, and that portion of the cable system "without question crosses and therefore 'uses' the public right-of-way." Id.

Moreover, ECI itself does use the public right-of-way. Its signal reaches its subscribers by using AMERITECH's fiber optic cable, which lies in the public right-of-way. Judge Rovner explained this point clearly:

> [C]ommon sense tells us that ECI itself also "uses" the public way in delivering cable programming to its subscribers. Quite simply, without access to the Ameritech lines that cross the public way, ECI's signals would have nowhere to go. The lines, certainly, belong to Ameritech, but ECI uses those lines -- and thus avails itself of the public way in which they are located -- no less by leasing the lines than by owning them outright. One can buy a car to drive around town or rent one -- either way one makes use of both the car and the public streets that the car traverses.

App. A-23. As Judge Rovner states, "'use' is a broad term, but its breadth alone does not create ambiguity." App. A-24.

The panel majority asked the rhetorical question of what sort of "use" concerned Congress, and then passed directly to the meaning of "construction": "We think it likely that when the average person thinks of the construction of a cable system, he thinks of the installation of cables, either on poles or underground." App. A-15. The panel majority concluded that because ECI did not construct a cable system over the public right-of-way, it has not "used" the public right-of-way. App. A-16. But, of course, under the statute "construction" is not a relevant concept. Congress did not exempt cable systems that do not construct their cable systems on the public right-of-way, it exempted

cable systems that have a facility that does not use the public right-of-way.

Congress chose a non-technical word with an ordinary meaning to determine whether an entity fell within the exemption to regulations. The word "use" simply does not mean "construct," nor does it mean "own." The FCC is not free to decide for itself that an ordinary non-technical word that Congress chose to use means something different. It must give effect to the language Congress enacted. See, e.g., Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Judge Rovner made this point succinctly:

> Neither the FCC nor my colleagues seem to dispute that ECI's transmission of signals over the public way through Ameritech's lines constitutes a "use" in the ordinary sense of that term ... (App. A-24); they simply think that there are plausible policy reasons that support construing the term more narrowly. Fine, but the authority to narrow the statute rests solely with Congress. Having chosen a term with an expansive, commonsense meaning, and supplying no definition of its own indicating that the term should be given a more particularized construction, Congress has bound us to the broader meaning of the word. (citation omitted)

App. A-24.

Finally, the panel majority found it irrelevant that the City of Chicago spent "considerable time extolling what they see as the public-interest virtues of widespread local franchising authority over ECI-like SMATV systems." App. A-16. But the point that the City made in its brief was not that franchising was in the public interest -- although, certainly, it is -- but rather that the regulatory scheme enacted by Congress demonstrates that a municipality's interest in a cable system extends far beyond its interest in construction in the public right-of-way. Congress has provided that franchising authorities may require cable operators to set aside channel capacity for educational, public, governmental, and other broad categories of video programming, see Sections 611, 621(b)(2)(B), and the power "to assure that access ... is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." Section 621(a)(3). These powers that Congress granted to franchising authorities show that Congress did not intend that municipalities' regulation of cable systems using the public right-of-way be limited to regulating construction and physical equipment located on the public right-of-way. The FCC may believe that Congress was unwise to grant local governments these substantial regulatory powers, but the Commission's dislike of dual regulation does not grant it leave to create a means by which the regulatory scheme Congress created can be circumvented at will.

To put it another way: not only is the meaning of the terms used by Congress plain, the structure of

the Act indicates that Congress meant precisely what it said. It also means that there is no room within the Act or its legislative history for an agency declaration that effectively eliminates the franchising requirement for potentially large portions of the cable industry. The Commission had tried to implement a regime similar to this one — video dialtone ("VDT"), and Congress explicitly rejected it in favor of a less radical open video system ("OVS") in the 1996 Telecommunications Act. See Section 302(b)(3), 110 Stat. 124.

III. THE COURT BELOW ERRED IN AFFORDING JUDICIAL DEFERENCE TO THE FCC's INTERPRETATION OF THE STATUTORY ALLOCATION OF INTER-GOVERNMENTAL REGULATORY RESPONSIBILITIES.

To the extent the court majority below accorded deference to the Commission's declaratory order restructuring the regulation of cable television, App. A-5, it misapprehended the *Chevron* line of cases on judicial deference. The Commission's interpretation below is not entitled to deference.

The *Chevron* doctrine applies only when a court reviews an agency's construction *of a statutory provision that the agency administers.* Chevron, 467 U.S. at 842. Chevron does not require judicial deference to every pronouncement that an agency makes. This Court has ruled that the courts need not give deference to any agency's construction of a

particular section of a statute unless there has been a delegation of authority to administer that particular section. See Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990), declining to afford deference to an agency's construction of a statutory provision that it did not administer; Martin v. OSHRC, 499 U.S. 144, 154 (1991), holding that agency adjudicative jurisdiction, as here asserted by the FCC, does not give rise to judicial deference, even where deemed "conclusive" under the statute; cf. Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997). This limitation is routinely recognized in the courts of appeals. See, e.g., Professional Reactor Op. Soc. v. U.S. Nuclear Reg. Com'n, 291 U.S. App. D.C. 219, 223, 939 F.2d 1047, 1051 (1991); Air North Am. v. Dept. of Transportation, 937 F.2d 1427, 1436-37 (9th Cir. 1991) (no *Chevron* deference where statute is not assigned special rôle by Congress in construing that statute).

Here Congress did not delegate to the Commission any responsibility to administer the federal requirement that cable operators obtain local franchises in Section 621(b), which gave rise to ECI's petition for declaratory ruling below. This requirement pertains to the duties assigned to the local governments. Even less did Congress delegate to the Commission the prerogative of adjusting inter-governmental boundaries prescribed by statute. This is not a "task [that] has been assigned primarily to the agency created by Congress" and does not "belong[] to the usual administrative routine" of the Commission. Cf. NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944). In the 1984 Act Congress "continued to rely

on local franchising as the primary means of regulation." Time-Warner Entertainment Co. v. FCC, 320 U.S. App. D.C. 294, 300, 93 F.3d 957, 963 (1996) (*per curiam*).

The limited delegation of authority to the FCC is inherent in the particular structure of the 1984 Act. The Act allocates regulatory responsibilities *amongst* the federal, state, and local governments, but it does not delegate regulatory authority *to* the state and local governments. The Act recognizes and limits their exercise of prior-existing authority under state law. Id. It merely "clarifies the current system of local, state and Federal regulation of cable television." H. Rpt. 98-934 at 19 (1984). The Commission is not the sole implementing agency under the Act. There are many sections of the Act with respect to which the FCC has no legislative or adjudicatory authority whatsoever.[5]

Congress having addressed the boundaries of local authority in the 1984 Act, there is no basis for agency curtailment of local authority. Cf. Cipollone v. Liggett Group, 505 U.S. 504, 517 (1992). Moreover, in Section 636 (Coordination of Federal, State, and Local Authority) of the Act, 47 U.S.C. § 556, Congress deliberately limited any pre-emption of non-federal authority to the express provisions of the Act.

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[5] See, e.g., Sections 622(a)-(c), (e), (f) (General Franchising Requirements), 625 (Modification of Franchise Obligations), 626 (Renewal), 627 (Conditions of Sale), 631 (Protection of Subscriber Privacy), 633 (Unauthorized Reception of Cable Service), and 635(a) (Judicial Proceedings), 47 U.S.C. §§ 542, 545, 546, 547, 551, 553, 555).

In the Telecommunications Act of 1996, Congress again gave careful attention to the interface between federal and non-federal regulation. In Section 601(c) (Federal, State, and Local Law), 47 U.S.C. § 152 nt, Congress explicitly precluded the courts and the Commission from according any implied pre-emptive effect to the Cable Act. Thus, it should be clear why the Commission's interpretations of the Act are not entitled to blanket deference. The Commission does not have either an undifferentiated policy rôle with respect to, or the responsibility to administer, the Cable Act in its entirety. With respect to the dispute over whether SMATV operators are required by Section 621(b) of the Cable Act to obtain a local franchise that gave rise to the Commission's declaratory rule, the Commission has no responsibility – legislative or adjudicatory – with respect to Section 621, which deals with local franchising and it directly appealable to the state or federal courts under Section 635(a).

Consequently, the Commission's attempt to limit the local governments' application of the sections of the Act which Congress has assigned to them must be rejected by this Court. The definitions in Section 602 that the Commission's order purports to interpret affect not only statutory provisions that the Commission administers but also affect the provisions of the Act reserved to the local governments to administer. Congress did not give the Commission the express power to construe those provisions, and certainly not in connection with other sections and

635(a) (Judicial Proceedings), with respect to which it had no administrative jurisdiction.

The majority opinion impliedly seeks to avoid this structural limitation by saying not only that "the agency interpretation is a reasonable one" but that "it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination." App. A-8. But that interpretation not an interpretation which is any more available to the courts to make than to the Commission for the reasons set forth under Points I and II *ante*.

Conclusion

The decision below is of exceptional importance to subscribers who depend on cable operators to deliver video programming and ancillary transmission services to their homes via cable. The panel accepted by a split vote the agency's determination that a whole class of wireline-based operators may provide cable service without any regulation, in defiance of the comprehensive statutory scheme evolved through successive Congressional enactments over a decade.

Because the Commission's interpretation of the Act raises issues of importance in the inter-governmental administration of the Cable Communications Policy Act of 1984, the Court should grant certiorari to review the decisions below.

Respectfully submitted,

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June, 2000

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 98-2729, 98-2901, 98-2940, 98-3064,
98-3078, 98-3079, 98-3267 & 98-3474

CITY OF CHICAGO; TEXAS COALITION OF CITIES ON FRANCHISED UTILITIES ISSUES; CITY OF ST. LOUIS; CHARTER TOWNSHIP OF MERIDIAN and CITY OF EAST LANSING, MICHIGAN; ALLIANCE FOR COMMUNICATIONS DEMOCRACY, ALLIANCE FOR COMMUNITY MEDIA, and CHICAGO ACCESS CORPORATION; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (NATOA); and MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

and

21ST CENTURY TELECOM GROUP, INC.; MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS OF WAY FROM TELECOMMUNICATIONS ENCROACHMENTS; and GREATER METRO TELECOMMUNICATIONS CONSORTIUM,

Intervening Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

and

ENTERTAINMENT CONNECTIONS, INC.; RCN TELECOM SERVICES, INC.; and WEDGEWOOD COMMUNICATIONS COMPANY,

Intervening Respondents.

Petitions for Review of an Order
of the Federal Communications Commission.
No. 98-111

ARGUED SEPTEMBER 14, 1999-DECIDED DECEMBER 7, 1999

Before BAUER, ROVNER, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. Today we review a declaratory ruling of the Federal Communications Commission that Entertainment Connections, Inc. (ECI), the operator of a satellite master antenna television system (SMATV), is not a "cable operator" of a "cable system" as defined in 47 U.S.C. § 522(5) and (7) and thus is not subject to a requirement that it obtain a franchise from a local government in order to operate. *In re Entertainment Connections, Inc. Motion for Declaratory Ruling*, FCC 98-111, 13 FCC Rcd. 14277 (1998) (JA 418-61). After the FCC ruled in the ECI case, several petitions for review were filed in various parts of the country, two of which

were filed in accordance with the procedures for multidistrict petitions, and the Panel on Multidistrict Litigation sent them to us. Subsequently, other cases were also transferred here and consolidated with this one.

ECI has about 1,600 subscribers in 12 large apartment buildings of at least 100 residents each in East Lansing and Meridian Township, Michigan. ECI began operations by using a satellite master antenna system, known as a "headend," on top of each building it served. Under this method of operation it is uncontested that no local franchise was necessary, in part because the signal was not sent over the public right-of-way. Then in 1996 ECI altered its method of operation but continued to provide its service without a franchise. East Lansing and Meridian made it clear that they thought ECI now needed a franchise.

The change of operation in 1996, giving rise to the claim that a local franchise is now required, was as follows. As before, ECI receives signals through its own satellite master antenna television facility, or "headend." The headend is placed on top an apartment building. But now ECI transmits the video signals from the headend to both its customers in the building on which the antenna is located and to those in other buildings. The signal is transmitted to the other buildings by fiber optic and coaxial cables, which are located in the public right-of-way but which are owned by Ameritech. For this purpose Ameritech used 12-strand cable, one strand of which is used for ECI's video signal. Ameritech's facilities connect to junction boxes located in the buildings; those in turn connect to ECI's interior building drop lines, which in turn connect to the subscriber's television sets. To obtain Ameritech services ECI subscribes to Ameritech's Supertrunking Video Service, for which it pays a monthly tariff.

In February 1997 ECI asked the FCC for a declaratory ruling that it was not required to have a franchise. The FCC, over a one-member dissent, found that ECI is not a cable operator because it does not provide service through a cable system and, therefore, it does not need a franchise. The FCC based its conclusion on a convergence of factors. One was that ECI's facilities are located on private property. Ameritech transports ECI's signal using 12-strand cable, one strand of which is used for ECI's signal. The other 11 strands are available to other cable providers, and ECI has committed to make its interior building line drops available to other programming providers. The facilities used by Ameritech to provide service to ECI were, for the most part, not constructed at ECI's request. ECI and Ameritech are separately owned; their relationship is as carrier-user. Under the agreement between the companies ECI has no right to control or repair Ameritech cable, and Ameritech lacks editorial control over the content of ECI's programming.

In addition, the FCC said that it was guided by the knowledge that a local jurisdiction's authority to regulate cable has been premised on the fact that cable systems involve extensive physical facilities and substantial construction on the public right-of-way. And, of course, ECI does not itself have facilities on the public right-of-way.

The FCC ruling analogized ECI's operation with what is called "video dialtone" service. Video dialtone was a regulatory framework, designed by the Commission, that permitted local telephone companies to make available, on a nondiscriminatory common carrier basis, a platform for the delivery of video programming and other services from the separately owned headend facilities of programmers to subscribers. Video dialtone, the FCC said, did not trigger a

franchise requirement because an entity that maintained reception and transmission equipment wholly on private property and transmitted the video signal through the public right-of-way by means of a local exchange carrier's facilities, made available on a common carrier basis, was not a cable operator. The Court of Appeals for the District of Columbia upheld the FCC. *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994). In the ECI case, the FCC said that although the provision for video dialtone no longer exists, the underpinnings of the video dialtone decisions remain sound--that is, that where there is no single system or unified control, there is no cable system.

The FCC also found that ECI qualifies for the private cable exemption to the definition of a cable system which is provided for operations which do not use the public right-of-way. 47 U.S.C. § 522(7)(B). The FCC reasoned that Ameritech, not ECI, is the entity using the public right-of-way; therefore, ECI qualifies for the exemption. Finally, the FCC noted that its ruling was consistent with the "pro-competitive mandate" given the Commission by Congress in the Telecommunications Act of 1996.

Our first inquiry involves the degree of deference, if any, to which the decision of the FCC is entitled: that is, is it entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)? Although some of the parties dispute it, we think it is pretty much beyond argument that the first prong of the Chevron analysis is met. That prong is a determination whether a statute is silent or ambiguous with respect to the issue we are considering. We believe our discussion which follows will highlight the ambiguities we find in the statute. If the statute is silent or ambiguous, then, under Chevron, we decide whether the agency's determination is based on a permissible construction of the statute. We may not

substitute our own construction of a statute when an agency has interpreted it in a reasonable fashion. *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996). In other words, so long as the agency has set out a reasonable interpretation, it does not matter whether, in the first instance, we would have come to the same conclusion. Wisely, we believe, we have noted that specialized agencies are "more qualified than generalist courts to handle technical matters within their purview. They are the experts. Court second-guessing of administrative decisions typically 'do[es] not make [for] better technical decisions than [those of] agencies.'" *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 476 (7th Cir. 1999), citing *United States v. Baxter Healthcare Corp.*, 901 F.2d 1401 (7th Cir. 1990).

Although the *Chevron* requirements are met, we consider a few other obstacles certain parties have attempted to throw in the path of our giving *Chevron* deference to the FCC decision. Some parties contend that the FCC was not granted regulatory authority over 47 U.S.C. § 541, the statute setting out general franchise requirements. We disagree. The FCC's regulatory authority was first set out *in United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and its authority continues to be recognized. *See AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). We have said that the FCC is charged by Congress with the administration of the Cable Act. *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995); see 47 U.S.C. § 543. We are not convinced that for some reason the FCC has well- accepted authority under the Act but lacks authority to interpret § 541 and to determine what systems are exempt from franchising requirements. See *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

Some parties argue that the declaratory ruling should not have been made because it is not outcome-determinative of

the dispute and does nothing to resolve a state court case filed in Michigan regarding whether a franchise is required under state law. This is really an argument that the FCC should not have heard ECI's petition in the first instance. We see no merit to the argument. The FCC has authority to issue declaratory rulings. 5 U.S.C. § 554(e); 47 C.F.R. § 1.2. This case resolves the controversy over whether the federal franchise requirement applies in this instance. Furthermore, the petition for a declaratory ruling from the FCC was filed on February 4, 1997, before the state court action was filed on October 31, 1997.

Others contend that *Chevron* deference is due regulations, but not declaratory rulings. Our cases show otherwise. An agency can, of course, promulgate its policy through individual adjudicative proceedings rather than rulemaking. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). And *Chevron* deference has been applied to adjudicative proceedings. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). An agency's interpretation of a statute it administers commands deference, regardless of whether it emerges as a result of an adjudicative proceedings or a rulemaking process. *Cowherd v. United States Dep't of Hous. and Urban Dev.*, 827 F.2d 40 (7th Cir. 1987).

In fact, it is unclear whether deference should be given to statements of an agency which are much less compelling than decisions in adjudicative proceedings. In *Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999), *cert. denied*, ___ S. Ct. ___ (Oct. 4, 1999), we made the point that the deference to be given to informal expressions of an agency's view is unresolved, but that some deference, at least, is to be paid even to views set forth in amicus curiae briefs filed by an agency. The ruling before us is a result of procedures which are far from

informal or casual. When ECI filed its petition on February 4, 1997, the FCC issued a public notice seeking comment on the motion. Several parties filed responses both in support of and opposition to ECI's position. Only then did the FCC proceed to make its ruling on June 30, 1998.

Our inquiry thus becomes whether the statutes are silent or ambiguous and, if so, whether the agency interpretation is a reasonable one. As we make this inquiry, it will also become clear that, while the agency interpretation is, of course, not the only possible one, it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination.

The question of deference to the FCC in cable regulation comes against a backdrop of agency hesitation to be in the business of cable regulation at all. The first commercial cable television system appeared in the 1950's as "Community Antenna Television," or "CATV." It was not until 1960 that the FCC began asserting jurisdiction over CATV systems, and since that time its role has gradually increased. In 1968 the Supreme Court upheld the FCC's authority in this area. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Eventually the FCC preempted local regulation in a number of ways, including signal carriage, pay cable, leased channel regulation, and access. But the FCC declined to preempt the role of local governments in franchising cable systems because of the burden that would have put on the agency. *Cable Television Report and Order*, 36 FCC 2d 143, 325 (1972); *Clarification of the Cable Television Rules*, 46 FCC 2d 175 (1974). The Commission ultimately determined that it was cable television's use of public rights-of-way which was the primary rationale for local control. *New York State Comm'n of Cable Television v. FCC*, 749 F.2d 804 (1984). In *Duplicative and Excessive Over-Regulation of Cable*

Television, 54 FCC 2d 855, 861 (1975), the Commission said:

> The ultimate dividing line [between federal and local regulation], as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission.

Despite the division of authority, the FCC determined that certain types of systems did not need to be franchised by local governments. More on that later.

Then in 1984 Congress adopted the Cable Communications Policy Act. It provided that, with limited exceptions, a cable operator could not operate without a franchise from a local government. Under this Act a "cable operator" is a person who provides service over a "cable system," in which it either owns a "significant interest" or "controls or is responsible for" the system's management and operation. A "cable system" was defined as a "facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522. The definition of "cable system," however, contained a "private cable" exception which exempted facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." § 522(6)(B)(1988).

In 1996 Congress again revised the Communications Act in the Telecommunications Act of 1996 by removing the requirement that a system serve "multiple unit dwellings under common ownership, control, or management" in order to benefit from the private cable exemption. The 1996 Act provides that the term "cable system" does not include "a facility that serves subscribers without using any public right-of-way." 47 U.S.C. § 522(7)(B). In the FCC's view, this amendment broadened the exemption.

The statutory provisions have consistently provided for exceptions to local regulation, and, as we said, the FCC has found that some types of systems are not subject to the local franchise requirement. Certain systems with some attributes at least similar to the ECI system have a history of exemption from the requirement. First is the type of system ECI originally operated. Under that system ECI had a headend on each building it served, rather than, as now, a headend on one building with the signal sent to other buildings. The former arrangement was not subject to the franchise requirement. A second kind of system exempted was that operating under the FCC video dialtone rules, rules which were promulgated under 47 U.S.C. § 533(b), which has since been repealed. In its decision affirming the FCC's determination that video dialtone systems did not require a franchise, the Court of Appeals for the District of Columbia quoted the Commission's statement that "[r]egulation [of the local telephone carrier] as a cable system would be duplicative because common carrier regulation 'incorporate[s] the same concerns about public safety and convenience and use of public rights of way that provide a key justification for the cable franchise requirement.'" The court agreed, saying that the "Commission's interpretation of the exemption to avoid

duplicative regulation is self-evidently reasonable." *National Cable Television Ass'n*, 33 F.3d at 73 and 74.

When SMATV--like the ECI system which transmits from an antenna to multiple buildings, not necessarily commonly owned--appeared, the FCC exempted those systems as well. *In re Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *affirmed by New York State Comm'n v. FCC.* A year later, in the 1984 Act, Congress defined the private cable exemption as one for systems serving subscribers on multiple unit dwellings under common ownership and which do not use the public right-of-way. The Commission then decided if SMATVs serve buildings with separate owners, the SMATV needed a local franchise. That decision was upheld against an equal protection challenge to the underlying statutory restriction regarding ownership. *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). Then Congress again amended the exemption, deleting the requirement regarding common ownership but doing nothing to clarify what "using" the public right-of-way entailed.

In contrast to systems exempted from franchise requirements, another type of system with some similarities to the ECI system has been required to have a local franchise. This is the type of system referred to as "channel service." Channel service is the provision by a local telephone company on a common carrier basis of video transport services to a cable operator holding a local cable franchise. Unlike video dialtone, in channel service the facilities are for the exclusive use of the cable operator, rather than accommodating multiple video programmers. Furthermore, a channel service facility is typically built, the Commission says, at the request of the cable company. Under this arrangement the cable company would obtain a franchise, and the common carrier would need approval

from the FCC to extend its facilities under 47 U.S.C. § 214 but was not required itself to obtain a franchise from a local governmental authority.

Our point in all of this is that the exemption from local franchise requirements of some technology which does, in fact, provide cable programming is not a novel nor a static one. Nor does the ever-evolving technology allow the boundaries which are drawn to always be clear and distinct. We find this background information helpful to understanding the issue before us--which, of course, remains whether the FCC's interpretation is reasonable.

There are two subsections of the Act with which we need to be primarily concerned. Section 522(5) of Title 47 provides a definition of a cable operator. It is undisputed that ECI provides cable service, but it is only a cable operator if it provides "cable service" over a "cable system" in which it owns a significant interest or if it controls or is responsible through any arrangement the management and operation of the cable system:

> [A]ny person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system[.]

The term "cable system" is defined in 47 U.S.C. § 522(7):

> the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which

> includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . (B) a facility that serves subscribers without using any public right-of-way.

Given the ECI operation, a number of questions are raised by these provisions. First, what is required for ownership of a significant interest or for control of management of the system? Another ambiguity we see is what is meant by "using" the public right-of-way.

The FCC looked to many aspects of the ECI service and determined that several factors, taken together, meant that ECI is not a cable operator because it does not provide service to its subscribers through a cable system. That the combination of factors is what the Commission relied on is supported by its cautionary word to other providers that the ruling is "expressly limited to the facts before the Commission as presented by ECI." ¶ 73.

In determining whether the FCC ruling is reasonable, we need to look fairly and carefully at what the agency actually said. The importance of that relatively simple concept inspires us to repeat the factors on which the FCC relied:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there

is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.

¶ 73. The FCC did not say, as more than one party contends, that ECI is not a cable system because it does not have complete ownership of the system. For instance, the Commission did not simply say that a cable operator "must own all the facilities used to transmit its signal across public rights of way . . . ." as the City of Chicago claims.[1] And while it is literally true that "[t]here is no language in section 602(7) [47 U.S.C. § 502(7) defining "cable system"] that makes the ownership of the components of a cable system relevant,"[2] it is also true that a cable system is run by a cable operator. To be a cable operator one must in some way own the system or control or be responsible for the management and operation of the system. In other words, the mention of ownership and control is found in the definition of "cable operator," but it is reasonable for the FCC to decline to read the related provisions regarding "cable operator" and "cable system" in splendid isolation from one another. Ownership and control are relevant factors under the statutes. Furthermore, the separation of ownership between ECI and Ameritech is an element, but not the sole basis, of the FCC decision. It is not unreasonable to conclude that when considered with all the factors relied on, if the components of the operation are completely under separate ownership and control, there is no entity which owns a significant interest in the system or who controls, manages, or operates the system as a whole.

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[1] Reply brief of petitioner City of Chicago, filed August 24, 1999, at 3.

[2] Reply brief at 6.

In addition, the exemption in § 522(7)(B), referred to as the private cable exemption, states that the definition of "cable system" does not include facilities which serve subscribers "without using public right-of-way." As we said, our question is, what exactly does "using" mean? In the ECI system, the signal is transmitted on Ameritech supertrunking video lines. Those lines are on the public right-of-way. But Ameritech provides the service to ECI as tariffed common carrier service. ECI pays for the service. ECI does not control where the lines go or the path over which the signal is sent. For the most part, the lines were not constructed at ECI's request. Other programmers can use the other 11 strands in the cable. Furthermore, Ameritech, as a telecommunications provider, is regulated under Title II of the Communications Act, 47 U.S.C. § 201 *et seq*. In order to put the lines up in the first place, Ameritech had to gain access to the public right-of-way. In addition, it offers its supertrunking video service to providers on a nondiscriminatory common carrier basis under tariffs approved by the Michigan Public Service Commission.

Under those circumstances, is it reasonable to say that ECI is not "using" the public right-of-way? It is true that ECI pays for Ameritech's capability to transmit its signal and that signal is being sent over the wires, wires for the most part which were already in place. But is this the sort of use that Congress was concerned with?

We think it likely that when the average person thinks of the construction of a cable system, he thinks of the installation of cables, either on poles or underground. That this sort of construction is highly intrusive on local governments is a large part of the reason for the local franchising requirement. The City of Chicago itself refers

to the burden state and local governments must bear from cable construction. It is true, as the FCC notes, that there are other concerns as well: mandatory carriage of television broadcast signals, nonduplication protections, local access, technical standards, and equal employment opportunity requirements. But construction on the right-of-way may be preeminent among them, and if not preeminent, certainly highly important, important enough to have special recognition in the Act. It is also the primary reason the FCC has left franchising to local authorities:

> [L]ocal governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts.

In re Earth Satellite Communications, at ¶ 22.

In ECI's system, construction of a cable system over the public right-of-way is not necessary. Ameritech had previously constructed its supertrunking system. It seems incontrovertible that in some important and historical sense of the word, it is reasonable to conclude that ECI has not "used" the public right-of-way.

Finally, several parties, particularly the City of Chicago, spend considerable time extolling what they see as the public-interest virtues of widespread local franchising authority over ECI-like SMATV systems. These parties, however, are in the wrong forum for airing their concerns. Their real quarrel is with Congress and the authority it has given to the FCC under current law.

For all these reasons, the petitions for review of the FCC's order are DENIED.

ROVNER, *Circuit Judge*, dissenting. If the FCC had unfettered authority to decide whether ECI is a cable operator, I would, in all likelihood, be joining my two colleagues today. Judge Evans makes a compelling case for the legitimacy of the FCC's judgment on this question. But the FCC's discretion is limited by the terms of the statute; only if there are ambiguities or gaps in those provisions may the FCC substitute its own judgment for that of the Congress. In this case, I find the statutory language to be so plain as to foreclose the FCC's rationale and conclusion, and for that reason I respectfully dissent.

As the majority points out, to qualify as a "cable operator," a company must either (A) provide service over a "cable system" in which it "owns a significant interest" or (B) it must "otherwise control[ ] or [be] responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C.A. § 522(5) (Supp. 1999). There can be no real doubt that ECI qualifies as a cable operator under either of these two prongs.

ECI owns a "significant interest" in the cable system at issue here. *Id.* ECI owns the "headend," where the video signals are first received, and at the other end of the system it owns the junction boxes and interior building drop lines whereby the signals are distributed to subscribers in the multiple dwelling units that ECI serves. There would be nothing to transmit over Ameritech's lines (and of course nothing to receive from those lines) absent the system components that ECI owns. In that sense, it defies logic to characterize ECI's interest as anything but "significant."

It is equally clear, in the alternative, that ECI "otherwise controls or is responsible for, through [some] arrangement,

the management and operation of . . . a cable system." Id. As the entity that has contracted with subscribers, it is ECI that is responsible for acquiring the programming its customers want, establishing a price, and delivering the video signals. ECI, and only ECI, is the company that subscribers look to for service. For the purpose of transmitting its programming to those subscribers, ECI has installed and maintained ownership of some equipment (the headend, the junction boxes, and the interior building drop lines), while leasing other equipment (one strand of Ameritech's twelve-strand cable). ECI has, in this way, assembled the components of a functioning cable service. It did not construct and does not own all of those components, but it is nonetheless *responsible* for those it does not own by subscribing to Ameritech's Supertrunking Video Service. If Ameritech provided spotty service, ECI would still be the company that subscribers looked to, given that Ameritech itself provides no cable service at all. Likewise, if Ameritech decided to abandon its lines or to cancel its lease with ECI, ECI would have to make alternate arrangements in order to continue providing service. There can be little doubt, then, that ECI, is "responsible"--partly through ownership and partly through leasing--for the system that delivers cable programming to its subscribers.

The FCC's analysis skirts these evident points by positing that there is no "cable system" for ECI to operate. ¶ 61. That notion is impossible to reconcile with the statutory definition of such a system, however. In relevant part, the statute provides:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control

> equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ."

47 U.S.C.A. § 522(7) (Supp. 1999).[1] It is undisputed that "cable service" is what ECI provides to its subscribers. ¶ 9. The pertinent question, then, is whether there is a cognizable facility consisting of the elements identified in the statute that is designed to deliver that service. Plainly there is. In fact, no one really denies that ECI delivers its cable service over a set of closed transmission paths and associated signal generation, reception, and control equipment. *See* ¶¶ 54-55. ECI has constructed and owns the portions of the system that initially receive the programming signals and ultimately distribute those signals to the subscribers living within the buildings ECI serves; Ameritech, on the other hand, carries the signals over the public way via cabling that it has leased to ECI.[2]

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[1] The statute proceeds to exempt from the definition of "cable system" facilities that do not use any public way. I address that exemption separately below.

[2] The parties have spilled much ink in the briefs debating whether this arrangement has the exclusivity characteristic of the more traditional cable systems that are constructed and owned entirely by the cable operator. Here, because Ameritech carries ECI's signals over multi-stranded cables, other cable providers could (assuming they were able to install junction boxes and interior drop lines on the same properties that ECI serves) lease other strands of wire in Ameritech's cables and serve the same customers that ECI serves. *See National Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 74-75 (D.C. Cir. 1994) (distinguishing "channel service" from "video dialtone"). What of it? Whether the

The FCC nonetheless denied the presence of a "cable system" because "there is an absolute separation of ownership between ECI's headend facilities, which are located entirely on private property, and the transmission facilities owned and controlled by Ameritech." ¶ 55. The two companies are entirely independent, the FCC emphasized. ECI, on the one hand, has "total control" over the programming it delivers to its subscribers, while Ameritech, on the other, exercises "complete stewardship" over the lines that deliver ECI's signal over the public way.

¶¶ 55, 56. The relationship between the two is that of carrier and user, nothing more. ¶ 55. Consequently, in the FCC's view, "ECI's facilities and Ameritech's facilities do not constitute a single, integrated cable system." ¶ 61.

The fundamental flaw in the FCC's analysis is that it seizes upon ownership of the transmission lines and

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wire that ECI leases in Ameritech's cable is the solitary strand in the cable or one of 100, that wire is nonetheless dedicated to ECI's exclusive use for the duration of the lease. Other providers can, of course, lease parallel strands in the same bundle, just as they theoretically could lay cable of their own following the same paths that Ameritech has blazed. ECI still provides service through a unified system of components that could be duplicated, perhaps, but cannot be intruded upon by other providers. *Cf. id.* at 75 (noting that by offering "video dialtone" service to subscribers in order to evade franchising requirement, a cable provider "would . . . have to give up its control over, including the right to exclude others from, the channel capacity that it formerly leased"); *see also* Tristani dissent at 3-4.

elevates that consideration to preeminence in determining whether or not a "cable system" exists. Congress, by contrast, directed the FCC to look at whether there is a set of closed transmission paths and associated equipment that delivers cable service to subscribers; nowhere in the statutory definition did it mention ownership of the transmission paths--or any other particular system component--as a relevant factor. § 522(7); *see also ante* at 12-13. Moreover, in defining who constitutes a "cable operator," Congress spoke in terms of a person who either (A) "owns a significant interest" in a cable system or (B) "otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." § 522(5). This language quite clearly envisions that one can operate a cable system without being the sole owner of the system components--without, in fact, holding any ownership interest at all in the transmission paths that cross the public way. To that extent, the statutory terms belie the notion that there must be a "single, integrated cable system" in which the cable provider owns the transmission paths on the public way as well as the components located on private property. *See* ¶ 61. ECI owns the latter and leases the former. No one can deny that by virtue of this arrangement, ECI has assembled a facility that functions precisely as Congress defines the term "cable system." Only by importing an ownership criterion that is not found in the statutory language, and which is in evident tension with that language, can the FCC escape this conclusion. As the FCC itself acknowledged, Congress considered but "intentionally omitted the Commission's previous requirement that all portions of a cable system be under common ownership or control." ¶ 56. However great the FCC's regulatory authority, it does not have the power to rewrite the statutory scheme; neither do we. *E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781 (1984).

The statute, of course, exempts from the definition of a "cable system" "a facility that serves subscribers without using any public right-of-way." § 522(7)(B). The FCC believed it is Ameritech, not ECI, that "uses" the public way because it is Ameritech that installs, repairs, and maintains the lines that traverse the public way. ¶ 62. In its view, ECI's "mere interaction" with Ameritech's lines does not constitute the type of "use" that Congress had in mind when defining a "cable system." *Id.*

Again I find it impossible to reconcile the FCC's construction with the language that Congress has employed. The first point to make is Commissioner Tristani's: The statute asks not whether ECI uses the public way, but whether the *facility* that delivers ECI's programming does. Tristani dissent at 5. Here, of course, the leased portion of the cable system without question crosses and therefore "uses" the public right-of-way. In any case, common sense tells us that ECI itself also "uses" the public way in delivering cable programming to its subscribers. Quite simply, without access to the Ameritech lines that cross the public way, ECI's signals would have nowhere to go. The lines, certainly, belong to Ameritech, but ECI *uses* those lines--and thus avails itself of the public way in which they are located--no less by leasing the lines than by owning them outright. One can buy a car to drive around town or rent one--either way one makes *use* of both the car and the public streets that the car traverses. The legislature's choice of the term "use," as opposed to a more specific and limiting term, signals that it meant to reach the very type of access to the public way that ECI has arranged. *Smith v. United States*, 508 U.S. 223, 229, 113 S. Ct. 2050,

2054 (1993). And I discern no ambiguity in the term that would permit the FCC to regulate in Congress' stead. "Use" is a broad term, but its breadth alone does not create ambiguity. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1955-56 (1998); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir. 1997); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398-99 (7th Cir. 1984), *aff'd*, 473 U.S. 606, 105 S. Ct. 3291 (1985). Neither the FCC nor my colleagues seem to dispute that ECI's transmission of signals over the public way through Ameritech's lines constitutes a "use" in the ordinary sense of that term (*see ante* at 14); they simply think that there are plausible policy reasons that support construing the term more narrowly. Fine, but the authority to narrow the statute rests solely with Congress. Having chosen a term with an expansive, commonsense meaning, and supplying no definition of its own indicating that the term should be given a more particularized construction, Congress has bound us to the broader meaning of the word. *Smith*, 508 U.S. at 228-29, 113 S. Ct. at 2054. Because ECI's leasing of Ameritech's lines for the purpose of transmitting its programming surely constitutes a "use" of the public way in ordinary parlance, the exemption is not applicable here.

For all of these reasons, I would grant the petitions for review, reverse the FCC's declaratory ruling, and hold that ECI is a "cable operator" which must obtain a franchise from the communities in which it provides service.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Agency Judgment
with Oral Argument

Date: December 7, 1999

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

Nos. 98-2729, 98-2906, 98-2940, 98-3064, 98-3078, 98-3079, 98-3267, and 98-3474

CITY OF CHICAGO, TEXAS COALITION OF CITIES ON FRANCHISED UTILITIES ISSUES, CITY OF ST. LOUIS, CHARTER TOWNSHIP OF MERIDIAN and CITY OF EAST LANSING, MICHIGAN, ALLIANCE FOR COMMUNICATIONS DEMOCRACY, ALLIANCE FOR COMMUNITY MEDIA, and CHICAGO ACCESS CORPORATION, NATIONAL CABLE TELEVISION ASSOCIATION, INC., NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (NATOA), AND MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

and

21ST CENTURY TELECOM GROUJP, INCORPORATED, MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS OF WAY FROM TELECOMMUNICATINS ENCROACHMENTS, and GREATER METRO TELECOMMUNICATIOSN CONSORTIUM,

Intervening petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

and

ENTERTAINMENT CONNECTIONS, INCORPORATED, RCN TELECOM SERVICES, INCORPORATED, and WEDGEWOOD COMMUNICATIONS COMPANY,

Intervening Respondents

Petitions for Review of an order of the Federal Communications Commission No. 98-111.

IT IS ORDERED AND ADJUDGED by this court that the petitions for review of the Federal Communications Commission's order are DENIED, with costs, in accordance with the decision of this court entered this date.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)
	)
ENTERTAINMENT CONNECTIONS, INC.	)
	)
Motion for Declaratory Ruling	)

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1998 **Released: June 30, 1998**

By the Commission: Chairman Kennard and Commissioners Ness, Furchtgott-Roth and Powell issuing a joint statement; Commissioner Tristani dissenting and issuing a statement.

[TABLE OF CONTENTS OMITTED]

I. INTRODUCTION

1. Entertainment Connections, Inc. ("ECI")[1] filed a motion for declaratory ruling pursuant to Section 1.2 of the Commission's rules.[2] ECI seeks a ruling that it is not a

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[1] ECI was originally joined in its Motion by Telecommunications Services Corporation ("TSC"). By letter dated January 20, 1998, TSC withdrew from the proceeding.

[2] Section 1.2 of the Commission's rules provides that "[t]he Commission may, in accordance with section 5(d) of the Administrative

cable operator required to obtain a franchise under Section 621 of the Communications Act of 1934, as amended, ("Communications Act").[3] The Commission issued a public notice seeking comment on ECI's motion. Numerous parties filed comments and reply comments related to ECI's motion.

2. Section 602 of the Communications Act provides that "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system"[4] is a cable operator. Section 621(b) provides that a cable operator providing cable service must obtain a franchise from an appropriate government entity. Section 651(a)(2) of the Communications Act as amended by the Telecommunications Act of 1996 ("1996 Act"), provides that a common carrier may transmit video programming without obtaining a cable franchise if it provides common carriage of video traffic.[5] In its Motion, ECI asserts that it does not fall within the definition of either a cable operator or cable system that must obtain a franchise as established by the Communications Act and the Commission's decisions. ECI contends that to the degree its signal is transmitted over a public right of way, it does so through the facilities of a local exchange carrier ("LEC"), and that the

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Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."47 C.F.R § 1.2.

3 Communications Act § 621(b)(1), 47 U.S.C. § 541(b)(1).

4 Communications Act § 602(5), 47 U.S.C. § 522(5).

5 Communications Act § 651, 47 U.S.C. § 571.

law does not require it to obtain a franchise under these circumstances.

3. ECI limits the issue in its motion for a declaratory ruling to whether it is required to obtain a cable franchise. We note that the issue of ECI's status as a cable operator has significant additional consequences under the Communications Act and Commission's rules, *inter alia*, mandatory carriage of television broadcast signals, nonduplication protection and syndicated exclusivity, cable television access and technical standards, and equal employment opportunity requirements.[6] In addressing ECI's Motion, we are cognizant that a finding that ECI is a cable operator would require ECI to comply with all of a cable operator's statutory obligations.

4. We grant ECI's Motion for a Declaratory Ruling. Because it neither owns an interest in the facility that transmits its programming over the public rights of way, nor controls, or is responsible for the management and operation of those facilities, we conclude that ECI is a not cable operator as defined by the Communications Act and is not obligated to comply with the requirements of Title VI of the Communications Act.

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[6] *See* Communications Act § 614, 47 U.S.C. § 534 (carriage of local commercial television signals); 47 C.F.R. § 76.51-70 (same); Communications Act § 614(b)(5), 47 U.S.C. § 534(b)(5) (nonduplication and syndicated exclusivity); 47 C.F.R. § 76.92-163 (same); Communications Act § 612, 47 U.S.C. § 532 (leased access); 47 C.F.R. § 76.701 (same); Communications Act § 632, 47 U.S.C. § 552 (consumer protection and customer service); 47 C.F.R. § 76.309 (same); Communications Act § 634; 47 U.S.C. § 554 (equal employment opportunity); 47 C.F.R. § 76.71-79; 47 C.F.R. § 76.601-30 (technical standards).

II. BACKGROUND

5. ECI contends that it is a satellite master antenna television ("SMATV")[7] operator that provides video programming to approximately 1,600 subscribers of 12 multiple dwelling units ("MDUs") that are variously owned, managed and controlled by other entities. Until 1996, ECI provided its service through separate headends located at each MDU. Since 1996, to transmit its video signal from one headend to other MDUs, ECI has used a service provided by Ameritech, the area's incumbent local exchange carrier, on a common carriage basis pursuant to Tariff No. 2, referred to as Ameritech Supertrunking Video Service.[8] The signal carrying the video programming that ECI provides to its subscribers transverses numerous public rights-of-way by way of Ameritech's facilities before connecting to ECI's various facilities inside the private property lines of the buildings ECI serves.[9] Ameritech's facilities connect to junction boxes located inside the individual MDUs, which connect to ECI's interior building drop lines, which connect to residents' television sets.[10]

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[7] The Supreme Court has stated that:

> Unlike a traditional cable television system, which delivers video programming to a large community of subscribers through coaxial cable laid under city streets or along utility lines, an SMATV system typically receives a signal from a satellite through a small satellite dish located on a rooftop and then retransmits the signal by wire to units within a building or complex of buildings.

FCC v. Beach Communications, Inc. 113 S. Ct. 2096, 2099 (1993).

[8] *See* ECI Motion, Exhibit 1 (Ameritech Supertrunking Video Service Confirmation of Service Order).

[9] *Id.* at 3.

[10] *Id.* at 4.

6. ECI contends that the same fiber that Ameritech uses to provide service to ECI can be used to provide service for up to eleven other video service providers.[11] ECI states that its facilities are located solely on private property and do not cross any public rights-of-way.[12]

III. THE PLEADINGS

A. ECI's Motion for Declaratory Ruling

7. In its Motion, ECI contends that it is not a cable operator[13] because (i) the facilities that are owned and controlled by ECI do not constitute a cable system, and (ii) the common carrier's facilities that deliver signals to ECI's facilities are not owned, managed or controlled by ECI.[14] ECI argues that its owned or controlled facilities consist of wiring and equipment located solely on the MDU owners' properties and that, pursuant to the 1996 Act, a facility that serves subscribers without using any public rights-of-way is not a cable system.[15]

8. ECI cites as support for its position the Commission's finding in *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-58*[16] that

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[11] *Id.* at 3-4.

[12] *Id.* at 4.

[13] *See supra* n. 4 and accompanying text, discussing the definition of a cable operator.

[14] ECI Motion at 6.

[15] *Id.*, citing Communications Act § 602(7)(B), 47 U.S.C. § 522(7)(B).

[16] 7 FCC Rcd 300, 327-28 (1991).

customer-programmers on a video dialtone platform were not required to obtain a cable franchise to provide their programming over the telephone companies' facilities. In particular, ECI notes the Commission's reasoning that customer-programmers are not cable operators because they neither own a significant interest in the telephone companies' facilities, nor control, manage, or operate those facilities.[17] ECI also cites the United States Court of Appeals for the District of Columbia Circuit's decision in *National Cable Television Association v. FCC*[18] which holds that customer-programmers of video dialtone service are not cable operators.[19] ECI quotes the *NCTA* court stating that:

> Where the "closed transmission paths" and "associated" head-end equipment are owned and controlled by different entities (as in video dialtone), and where different configurations of equipment would be used to move video programming from the different providers to the different customers, the concepts of a single, integrated system and unified control are not present.[20]

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[17] ECI Motion at 8, citing 7 FCC Rcd at 327, 328 n. 86.

[18] 33 F.3d 66 (D.C. Cir. 1994) ("*NCTA*"). In *NCTA*, the District of Columbia Circuit reviewed the Commission's determination that video dialtone operators and customer/programmersneed not obtain cable franchises pursuant to Section 621(b) of the Communications Act. *Id.*

[19] ECI Motion at 8.

[20] *Id.* at 8, quoting *NCTA*, 33 F. 3d at 74.

ECI notes the District of Columbia Circuit's finding that the customer-programmer's control of the head-end equipment and responsibility for the program selection were not enough to warrant a finding that the customer-programmer had control of, or responsibility for, the operation and maintenance of the overall facilities themselves.[21] ECI contends that it is in the same position as customer-programmers on a video dialtone platform with respect to a lack of control or responsibility for the operation and maintenance of the common carrier's facilities, and that therefore, ECI need not obtain a cable franchise.[22]

9. ECI argues that pursuant to Section 651(a)(2) of the Communications Act, one of the four options for providing video programming permitted to common carriers includes the provision of video programming on a common carriage basis. ECI submits that, consistent with Section 651(a)(2), Ameritech complies with Title II requirements and is not required to comply with Title VI requirements.[23] ECI also states that allowing it to operate without obtaining cable franchises is consistent with the pro-competitive nature of the 1996 Act and that it is exempt from the franchise requirement under Section 602(7)(B).[24] ECI asserts that requiring it to obtain a cable franchise will further inhibit competition to franchised cable operators.

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[21] ECI Motion at 8-9.

[22] ECI also notes that Ameritech's fiber "often" is routed to one of Ameritech's central offices before going to the property served by ECI, further illustrating ECI's lack of control. *Id.* at 9.

[23] *Id.* at 10.

[24] *Id.* at 10-11.

10. In the alternative, ECI suggests that even if the Commission were to conclude that ECI controls the operation of Ameritech's facilities, the common carrier's facilities would not be a cable system because they are used to transmit video programming to ECI's facilities rather than "directly to subscribers" as required by the Communications Act.[25] In addition, ECI notes that while Section 651(a)(1) applies to common carriers' use of radio-based systems to provide programming "to subscribers," Section 651(a)(2) expressly omits the key phrase "to subscribers."[26] Therefore, argues ECI, Section 651(a)(2) applies whenever a common carrier is providing transmission of video programming on a common carrier basis.[27] Moreover, according to ECI, the *NCTA* court recognized that a facility transmitting signals from one cable operator to another that stops short of the subscriber's homes is not a cable system.[28]

11. Although ECI acknowledges the generally accepted proposition that a cable operator using channel service must obtain a cable franchise,[29] ECI asserts that its

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[25] *Id.* at 12; *see* Communications Act § 602(7)(C), 47 U.S.C. § 522 (7)(C).

[26] ECI Motion at 16-17.

[27] *Id.* at 17.

[28] *Id.* at 12, citing *NCTA*, 33 F. 3d at 74.

[29] *Id.* at 14. The Commission has stated that channel service is the provision by a telephone company of video distribution facilities and services to franchised cable operators on a common carrier basis. *See Telephone Company-Cable Television Cross-Ownership Rules*, Section 63.54 - 63.58, CC Docket No. 87-266, Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849, 5870 n. 2; *Telephone Company-Cable Television Cross-Ownership Rules*, Section 63.54 - 63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed

services are distinguishable from channel service. Channel service entails a telephone company building a video distribution system from the interconnection with the recipient's headend to the subscriber's premises and leasing it, in whole or part, to a cable operator.[30] ECI contends that since channel service facilities are deployed for the exclusive use of the franchised cable operator and it is only one of several entities able to use Ameritech's fiber, the channel service analogy is not appropriate.[31] ECI also notes that franchised cable operators using channel service ordinarily maintain and control the common carrier's facilities. ECI contends that its situation differs from that of *New York Telephone*,[32] noting that the Commission's *New York Telephone* decision involved a request for a video dialtone trial rather than the request sought by ECI.[33] ECI further argues that the Commission's decision in *New York Telephone* is inapposite because it was rendered prior to the enactment of the 1996 Act.

B. Comments in Support of ECI's Motion

Rulemaking, 7 FCC Rcd 5781, 5787, n.21 (1992) ("*Second Report and Order*").

[30] *NCTA*, 33 F.3d at 71; *see also First Report and Order*, 7 FCC Rcd at 327.

[31] ECI Motion at 14.

[32] 8 FCC Rcd 4325 (1993), Order on Reconsideration, 10 FCC Rcd 11548 (1995) ("*New York Telephone*") (New York Telephone's intended use of Liberty Cable's coaxial drops was an acceptable means of complying with the Commission's video dialtone rules during a limited, one-year trial).

[33] ECI Motion at 15.

12. Several SMATV and wireless cable operators support ECI's motion for a declaratory ruling that the lease of transmission capacity from common carriers for the transport of video programming across public rights-of-way does not require a cable television franchise pursuant to Section 621 of the Communications Act.[34] The comments in support of ECI argue that the distribution of video programming through a programmer's facilities located solely on private property does not constitute a cable system[35] under Section 602(7)(B) of the Communications Act[36] and does not trigger the cable franchise requirements of Section 621.[37]

13. Commenters note that Section 602(7)(B) exempts from the definition of cable system facilities that serve subscribers "without using any public right-of-way."[38] Commenters allege that a SMATV system that does not use

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[34] *See* OpTel, Inc. Comments ("OpTel Comments); ICS Communications, Inc. Comments ("ICS Comments"); Wedgewood Communications, Inc. Comments ("Wedgewood Comments"); RCN Telecom Services, Inc. Comments ("RCN Comments"); Microwave Satellite Technologies, Inc. Comments ("MSTI Comments"); MultiTechnology Services Reply Comments ("MTS Reply Comments"); Independent Cable & Telecommunications Association Reply Comments ("ICTA Reply Comments").

[35] *See infra* n.186 and accompanying text, discussing the definition of cable system.

[36] Communications Act § 602(7)(B), 47 U.S.C. § 522(7)(B).

[37] RCN Comments at 2, 5; MSTI Comments at 4; OpTel Comments at 2.

[38] Optel Comments at 2., citing Communications Act § 602 (7), 47 U.S.C. § 522(7); *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2099 (1993); *Definition of a Cable Television System*, 5 FCC Rcd 7638, 7640-41 (1990); Wedgewood Comments at 4-5; ICS Comments at 6.

a public right-of-way is not a cable system.[39] OpTel argues that the common carrier providing video transport to ECI, rather than ECI itself, has the requisite nexus with the local jurisdiction which would justify local regulation.[40] In this regard, OpTel argues that the common carrier owns the fiber optic cable which crosses the public right-of-way, operates the "extensive physical facilities" involved and has engaged in "substantial construction" on public property.[41] In addition, ICS Communications, Inc. ("ICS") argues that the common carrier, rather than the SMATV operator, is responsible for any facility repair and maintenance that will affect the use of the public right-of-way.[42] By contrast, commenters argue that ECI, as a customer of the common carrier, has no nexus with the local jurisdiction, has no ownership or control over the facilities and will not engage in any construction or installation on public property.[43]

14. MSTI cites the Commission's decision in *Definition of a Cable Television System*[44] as defining a subscriber as "a member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it."[45] In support of its

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[39] Wedgewood Communications Inc. Comments at 5; ICS Comments at 6. SBVS argues for an interpretation of "use" which is as narrow as possible and promotes, rather than discourages competition. SBVS Reply Comments at 5-6.

[40] Optel Comments at 2, citing *Beach Communications* 113 S.Ct. at 2104.

[41] *Id.*

[42] ICS Comments at 6.

[43] OpTel Comments at 3; ICS Comments at 6.

[44] 5 FCC Rcd 7638, 7642 (1990).

[45] MSTI Comments at 3.

argument, MSTI cites a Commission program access ruling involving a Walt Disney Company subsidiary, Madeira, which owns a program distribution facility serving hotels at the Walt Disney World Complex.[46] In that decision, the hotels received the Madeira programming and distributed it to guest rooms using their own internal wiring. MSTI cites the Commission's statement that "[s]ince Madeira services the hotels, and since the hotels do further distribute the programming, there are arguably no true subscribers to Madeira's operation, so the operation cannot be considered a cable system."[47]

15. Several commenters state that an entity, having no subscribers of its own, providing video transport services on a common carrier basis to an entity with facilities located solely on private property is not a cable operator subject to Title VI regulation.[48] MSTI argues that neither the entity providing video transport services on a common carrier basis between two or more MDUs, nor a video service provider serving the MDUs by hiring the unrelated carrier's interconnection service, is a cable operator.[49] RCN argues that a SMATV system that leases capacity from a common carrier pursuant to a tariff does not satisfy the definition of a cable operator under Section 602(5) because it does not own or control a cable system or have

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[46] MSTI Comments at 4, citing *Petition of Walt Disney Company for Waiver of Program Access Rules*, 5 FCC Rcd 4007, n. 18 (1994) ("*Disney*").

[47] MSTI Comments at 4, quoting *Disney*, 5 FCC Rcd 4007, n. 18.

[48] MSTI at 1; OpTel Comments at 1; RCN Comments at 4.

[49] MSTI Comments at 1-2.

responsibility for its management and operation, and does not have exclusive rights to the common carrier facilities.[50]

16. Several commenters contend that the Commission's video dialtone decisions support ECI's proposition.[51] Supporters cite the Commission's determination in *Telephone Company-Cable Television Cross Ownership Rules*[52] that a local exchange carrier ("LEC") providing video dialtone service does not fall within the cable operator definition because the LEC itself is not providing the video programming service directly to subscribers.[53] Rather, supporters argue, the LEC is acting as a conduit in providing broadband common-carrier based service that enables customer-programmers to provide video programming service to subscribers. MSTI points to the Commission's holding in *Telephone Company-Cable Television Cross Ownership Rules*[54] that customer programmers did not qualify as cable operators and were not subject to the franchise requirement since they neither owned a significant interest in the LEC's facilities nor were responsible for the management and operation of those facilities.[55] MSTI argues that Ameritech provides ECI the same service provided by a LEC video dialtone operator to

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50 RCN Comments at 4.

51 MSTI Comments at 5; ICS Comments at 8.

52 7 FCC Rcd 300, 327 (1991).

53 MSTI Comments at 5; ICS Comments at 8, citing Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-58, CC Docket No. 87-266, 7 FCC Rcd 300, 327-28 (1991).

54 7 FCC Rcd 5069, 5071-73 (1992), *aff'd*, NCTA, 33 F. 3d 66 (D.C. Cir. 1994).

55 MSTI Comments at 5.

its customer programmer.[56] Commenters also cite the *NCTA* decision as supporting ECI's position.[57] Commenters argue that the Commission's video dialtone proceedings determined that local telephone companies already receive authorization to use public rights-of-way pursuant to common carrier regulation and therefore it would be redundant to require LECs to obtain a cable television franchise to use rights-of-way they were already authorized to use.[58]

17. Several commenters argue that requiring a video programming provider utilizing common carrier video transport service to obtain a franchise would counter Congressional intent to streamline regulation of new entrants in the video programming market.[59] Commenters argue that from a policy perspective, the imposition of a cable franchise requirement on companies such as ECI would impede innovation and competition in the market for delivery of video programming.[60]

18. ICS supports ECI's Motion and urges the Commission to expand the scope of this proceeding and rule that private cable operators should have an opportunity to use the fiber facilities of any independent provider, whether offered on a common carrier or private carrier basis, without

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[56] *Id.* at 5-6.

[57] *See supra* n.18 and accompanying text, discussing the *NCTA* decision.

[58] ICS Comments at 9.

[59] RCN Comments at 6; Optel Comments at 3; ICS Comments at 12-13; SBVS Reply Comments at 6-7.

[60] RCN Comments at 7-8; ICS Comments at 11; MTS Reply Comments at 4.

incurring cable franchise obligations under Section 621 of the Communications Act.[61] MTS argues that the Commission should give franchised cable operators the option of maintaining their current networks while being subject to franchise requirements, or divesting themselves of their cable plant by transfer or assignment to an unaffiliated third party, and leasing transport from a common carrier subject to local regulation and accountable for its use of the public right-of-ways.[62]

C. Comments Opposing ECI's Motion

19. Numerous cable industry groups, cable operators, and local franchising authorities oppose ECI's Motion.[63] The opponents argue that ECI is providing cable service[64] under its arrangement with Ameritech.[65] The opponents state that the question for the Commission to determine is whether the *combination* of facilities used by ECI is a cable system. The opponents claim it is. The opponents assert that the combined facilities meet every element of the statutory definition of a cable system: ECI owns the "facility" consisting of "closed transmission paths" (its wires); "associated signal generation . . . equipment" (its headend, located in one or more MDUs it serves); "reception . . . equipment" (the dish and antenna also located in one or

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[61] ICS Comments at 5.

[62] MTS Reply Comments at 6.

[63] *See* Time Warner Cable Comments ("Time Warner Comments"); US West, Inc. Comments ("US West Comments");

[64] *See infra* n.185 and accompanying text, discussing the definition of cable service.

[65] Time Warner Comments at 5; NCTA Comments at 4; Ameritech New Media Comments at 4; City of New York Comments at 10-11.

more MDUs); "control equipment" (such as scramblers authorizing its premium services); "designed to provide cable service" (services including video programming); provided to "multiple subscribers" (the residents of the multiple dwelling units); "within a community" (each community unit within which ECI is operating).[66] Ameritech New Media argues that, combined, the fiber and wires create a closed transmission path leading directly to the subscriber which constitutes an integrated video programming delivery system, and that such a system meets the statutory criteria for a cable system.[67] Ameritech New Media analogizes ECI's proposal with General Motors purchasing tires from Michelin for new cars: the tires are essential for the car to move from one place to another, but the fact that they are purchased from another supplier does not destroy either the integrity of the final product, the car, nor alter the identity of General Motors as a car manufacturer.[68]

20. The opponents assert that the bifurcated analysis utilized by ECI (Ameritech's facilities exempted by Section 602(7)(C), and ECI's facilities exempted under 602(7)(B)) ignores the plain statutory language, and well-established Commission precedent, that all technically integrated facilities used to deliver cable service from a single headend constitute a single cable system.[69] Time

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[66] US West Comments at 3; City of New York Comments at 10.

[67] Ameritech New Media Comments at 5.

[68] *Id.* at 6.

[69] *Time Warner Comments at 6-7, citing Definition of a Cable Television System,* 63 FCC 2d 956, 964-65 (1977); City of Lansing Reply Comments at 7, citing Communications Act § 602(7)(C), 47 U.S.C. § 522(7)(C).

Warner argues that Section 602(7)(C) is inapplicable to ECI because only a portion of the combined facilities will be offered on a common carrier basis, while the headend and the private property component are not common carrier facilities.[70] The opponents state that the common carriage exception applies only to common carrier facilities which extend from end-to-end and that the Communications Act expressly states that "such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers."[71] The opponents argue that the 602(7)(B) public right-of-way exception applies only to facilities that proceed from end-to-end without using a public right-of-way, and that ECI uses public rights-of-way.[72] In the alternative, the opponents argue that the fact that ECI's wholly-owned facility does not use any public right-of-way is irrelevant, because the combined facilities, as a whole, make extensive use of public rights-of-way.[73] Time Warner notes that Congress expressly stated that different entities may separately own significant interests in different portions of a cable system which does not detract from the conclusion that a technically integrated facility which uses closed transmission paths crossing public rights-of-way to deliver cable service is a cable system.[74] In this regard, the City of

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[70] Time Warner Comments at 8.

[71] Time Warner Comments at 9; US West Comments at 4, quoting Communications Act § 602(7), 47 U.S.C. § 522(7).

[72] Time Warner Comments at 14; NCTA Comments at 5.

[73] Time Warner Comments at 14-15; NCTA Comments at 5; City of New York Comments at 5-6; Alliance Comments at 13.

[74] Time Warner Comments at 17, citing *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 RR2d 1, 6 (1985).

New York claims that the Commission has interpreted the term "use" in Section 602(7)(C) of the Communications Act to exclude only infrared and other wireless transport technologies.[75] Several of the opponents cite a 1990 Illinois Circuit Court decision[76] involving similar circumstances in which the court determined that the entity leasing the facilities that crossed public rights-of-way was a cable system as defined by the Communications Act.[77]

21. The opponents argue that ECI is a cable operator as defined by Section 602(5)(B) because it controls and is responsible, through an arrangement, for the management and operation of all key aspects of the combined facility.[78] Ameritech New Media claims that ECI is a cable operator because it: (1) controls the necessary signal generation, reception and control equipment which is associated with the selection and provision of video programming; (2) directly bills the subscribers for the provision of video services; and (3) controls the means of distributing the video programming by virtue of its decision to purchase a tariffed telecommunications service enabling it

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[75] City of New York Comments at 6-7, quoting *Definition of a Cable Television System*, 5 FCC Rcd 7638, 7639 (1990).

[76] *See City of Chicago v. Day*, Case No. 88-MC-313994 (Cir. Ct. Cook Cty, Ill May 1, 1990) ("this court finds that [the programmer's] cable operation is an integrated system consisting of a signal generating reception and control equipment at the Essex Hotel, the interconnecting closed set of transmission paths leased from [Illinois Bell] and the distribution systems located at each building to which it provides cable service. Therefore, [the programmer] does not qualify for the [common carrier] exemption contained in the Cable Act.").

[77] Time Warner Comments at 11-12; NCTA Comments at 10-11; US West Comments at 4, n.5, 11.

[78] Time Warner Comments at 15; US West Comments at 5.

to use a common carrier's fiber crossing public rights-of-way to take the signal to its subscribers.[79] According to the opponents, the Commission has expressly rejected the technical maintenance and repair test for the definition of a cable operator, and instead looks to the entity with editorial control, the entity responsible for the selection, packaging and pricing of video programming offered to subscribers.[80] US West argues that, in the 1984 Cable Act Rulemaking, the Commission specifically held that the definition of cable operator was "intentionally broad" -- broad enough to apply cable rules to many entities which in combination delivered cable services to the public.[81] Moreover, US West states that the broad sweep of the cable operator definition is designed to encompass entities involved in hybrid arrangements such as ECI's arrangement with Ameritech.[82]

22. While ECI claims that its arrangement with Ameritech is consistent with the Commission's video dialtone decisions and the District of Columbia Circuit's decision in *NCTA,* the opponents argue that, because ECI controls the headend and subscriber service facilities while directing Ameritech's delivery of its signal, ECI's arrangement with Ameritech is clearly that of channel

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[79] Ameritech New Media Comments at 6-7.

[80] Time Warner Comments at 16, quoting Telephone Company--Cable Television Cross--Ownership, 7 FCC Rcd 5069, 5071-72 (1992); Ameritech New Media Comments at 9.

[81] US West Comments at 5, citing *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 RR2d 1, 6 (1985).

[82] US West Comments at 5.

service.[83] Contrary to ECI's claims, the opponents assert that channel service is not a private carrier service and has always been a common carrier service.[84] Indeed, NCTA asserts that the order cited by ECI as support for its characterization of channel service as a private carrier service fails to support this contention. Instead, the order describes channel service as "the provision on a common carrier basis by a local telephone company of video transport service to a cable operator holding a local cable franchise from the cable operator's headend to the residential customer's premises."[85] NCTA cites *Northwestern Indiana Telephone Company v. FCC*[86] in which the District of Columbia Circuit upheld the Commission's rejection of a Section 214 certificate to a local telephone company that

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[83] Time Warner Comments at 11; City of New York Comments at 8; Alliance Comments at 5-6.

[84] Time Warner Comments at 12; NCTA Comments at 12; Alliance Comments at 6. See ECI Motion at 14 ("Channel service is the provision on a private carrier basis by a local telephone company of video transport services to a franchised cable operator from the cable operator's headend to the subscriber premises."), citing *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-58*, 7 FCC Rcd 5781, 5787, n.21 (1992).

[85] NCTA Comments at 12, quoting *Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd 5781, 5787, n.21 (1992).

[86] 872 F.2d 465 (D.C. Cir. 1989). In supporting its decision to deny the Section 214 certification, the Commission argued that Northwestern Indiana incorrectly claimed that the Commission had certified other telephone companies that were offering channel service on a discriminatory basis. In explaining why the existence of a single franchisee in each of the cases cited by Northwestern Indiana did not establish an inconsistency in the Commission's application of its rules, the Court of Appeals found ". . . the existence of only one franchisee in the *Ohio Bell* and *C&P* settings resulted not from the telephone companies' refusal to provide common carriage, but from the licensing decisions of the local governments involved." *Id.* at 469.

refused to provide channel service to all locally franchised entities.[87]

23. The opponents claim that ECI's reliance on the *NCTA* decision upholding the Commission's video dialtone regulations is misplaced. According to the opponents, the Commission has carefully circumscribed the application of the video dialtone rules and Congress has expressly repealed "the Commission's regulations and policies with respect to video dialtone."[88] The Alliance states that ECI cannot avail itself of the benefits of the defunct video dialtone regulatory regime without, at a minimum, taking on the regulatory responsibility to act itself as a common carrier of unaffiliated third party signals.[89] The opponents also state that the *NCTA* decision relied heavily on the fact that multiple packagers of programming could reach the end-user subscriber -- an essential component missing from ECI's proposal.[90] In addition, Time Warner claims that the *NCTA* court declined to address the fact pattern presented by ECI -- an arrangement where a single entity controls (1) the headend equipment, (2) program selection, and (3) an ownership and operational interest in a significant portion of the distribution network.[91]

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[87] NCTA Comments at 12.

[88] Alliance Comments at 8, n.12, quoting 1996 Act § 302(b)(3); Time Warner Comments at 18; NCTA Comments at 9; Ameritech New Media Comments at 11; Alliance Comments at 6-7.

[89] Alliance Comments at 11.

[90] US West Comments at 8; City of New York Comments at 14; East Lansing/Meridian Comments at 8.

[91] Time Warner Comments at 18.

24. Time Warner asserts that Section 651(a)(2) of the Communications Act,[92] outlining the common carrier video transport option, does not offer refuge to ECI from the requirement to obtain a cable franchise.[93] Time Warner argues that, while it exempts Ameritech as a common carrier from obtaining a franchise, Section 651(a)(2) does not safeguard the user of such common carrier facilities that are used in the transmission of video programming directly to subscribers.[94] The opponents argue that Ameritech's Title II regulation in this arrangement only governs its action as a common carrier, and does not include the provision of video programming to subscribers by ECI.[95] US West also states that Section 651(a)(2), while carrying forward the leaseback arrangement, specifically defers to the definitions in Section 602(7)(C), under which "such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers."[96] Time Warner argues that if Congress had intended to exempt all use of common carrier systems from Title VI regulation, it could have done so. Instead, Congress specifically added the second sentence to Section 651(a)(2) to expressly provide that common carrier facilities could be considered part of a cable system.[97] The opponents also state that the 1996 Act does not address the regulatory status

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92 *See infra* n.179 and accompanying text, discussing Section 651(a)(2) of the Communications Act.

93 Time Warner Comments at 20.

94 *Id.* at 21.

95 Ameritech New Media Comments at 10; Alliance Comments at 10.

96 US West Comments at 9, quoting Communications Act § 651(a)(2), 47 U.S.C. § 571(a)(2).

97 Alliance Comments at 11.

of customer-programmers utilizing common carrier video transport.

25. In response to ECI's arguments that the regulatory burden of being classified as a cable operator is often too great for smaller telecommunications providers to bear, Time Warner asserts there is no statutory basis for establishing a different standard for smaller companies.[98] In this regard, Time Warner observes that thousands of smaller cable systems already operate under franchise requirements.[99] Moreover, the opponents note that it is difficult to understand why any common carrier would accept the Title VI franchise-like requirements (franchise fees, ceding two-thirds channel capacity, and Public, Educational, and Governmental Access) imposed on open video system providers by Congress in the 1996 Act, if the Commission sanctions the enormous loophole claimed by ECI.[100] Under ECI's proposal, NCTA argues no franchise is required, even though ECI's system, by leasing the facilities of an unaffiliated common carrier, may conceivably serve every MDU in a community.[101] Nor is it necessary to stop at MDUs; the logic of ECI's proposal applies equally to single dwelling units.[102] Such entities would be exempt from all regulatory oversight, which was clearly not intended by Congress.[103] Specifically, the Alliance claims that Congress

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[98] Time Warner Comments at 21.

[99] *Id.*

[100] Time Warner Comments at 21; NCTA Comments at 6; US West Comments at 10; East Lansing/Meridian Comments at 8.

[101] NCTA Comments at 6.

[102] *Id.* at 6.

[103] Ameritech New Media Comments at 11.

generally intended that wireline video programming services should be regulated at the local level.[104] The City of New York observes that, while Congress intended to promote competition in the telecommunications industry through enactment of the 1996 Act, Congress also made clear that such competition was not intended to eviscerate the cable franchise requirement.[105] The opponents argue that granting ECI's motion will substantially reduce local communities' ability to control their own destinies with regard to multichannel video programming.[106]

D. Reply Comments

26. ECI objects to ICS's and Ameritech New Media's proposals to expand the scope of this proceeding arguing that the Commission should decide only the issues raised by ECI in its motion.[107] ECI notes that Ameritech's affiliate Ameritech New Media filed an opposition to ECI's motion even though Ameritech is providing video transport service to ECI, Wedgewood and others. ECI alleges that Ameritech New Media opposed its motion because Ameritech wants to inhibit competition in areas where it is a franchised cable operator.[108] ECI asserts that Ameritech's own advertisements for its supertrunking service repeatedly represented that users would not need a franchise and that Ameritech New Media's position before the Commission

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[104] Alliance Comments at 8.

[105] City of New York Comments at 18.

[106] Alliance Comments at 15; City of Lansing Reply Comments at 9.

[107] ECI Reply Comments at 2; *see* ICS Comments at 5,6,9; Ameritech New Media Comments at 12, n.18.

[108] ECI Reply Comments at 5.

contradicts its corporate affiliate's advertisements.[109] ECI submits Ameritech's advertisement for its supertrunking service, which states that "network repair and maintenance" is included in Ameritech's service.[110] As further evidence of Ameritech's control over its own fiber, ECI states that Ameritech refused to provide it with enhancements, such as two-way service and multiplexing.[111]

27. In response to arguments by the Alliance, Ameritech New Media and NCTA that the Commission's reasoning in its video dialtone proceeding should be ignored because video dialtone has been repealed, ECI submits that the Commission's reasoning from the video dialtone context is nevertheless applicable by analogy in situations other than video dialtone and that the District of Columbia Circuit's ruling in *NCTA* has not been vacated.[112] ECI argues that the Commission's video dialtone decisions and the District of Columbia Circuit's 1994 *NCTA* decision explicitly recognize that "where the telephone company did not own or control the headend equipment but owned and controlled only its own facilities, its facilities and the headend equipment were not part of one facility under the definition of a <cable system.="[113] Accordingly, ECI asserts that Time Warner's argument that the definition of a cable system changed from 1977 to 1984 so that all technically integrated facilities used

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[109] *Id.* at 6, Exhibit 1. ECI acknowledges that it did not receive such written advertising prior to commencement of its service, but instead received numerous oral assurances from an Ameritech manager that ECI would not need a franchise if it used Ameritech's service. *Id.* at 7.

[110] *Id.* at 17, Exhibit 1.

[111] *Id.*

[112] ECI Reply Comments at 12.

[113] *Id.* at 11, citing *NCTA*, 33 F.3d at 74.

to deliver cable service from a single headend are a single cable system is simply incorrect.[114]

28. ECI asserts that the City of Chicago's determination that Wedgewood did not need a franchise is controlling legal authority.[115] In addition, ECI distinguishes the *Day* decision by noting that, in that case, the common carrier built the facilities in order to lease them to the SMATV operator and that issues of control and use of the facilities in that situation are unclear.[116] ECI contends that opponents incorrectly focus on the issue of whether public rights-of-way are used in the provision of video programming, rather than focusing on whether ECI's facilities are using public rights-of-way.[117] ECI states that the 1996 Act focuses on whether an entity providing cable service owns or controls a cable system. ECI asserts that the exception contained in the cable system definition focuses on the transmission facility itself and if the facility does not use a public right-of-way, then it is not a cable system and the provider does not need a franchise.[118] Moreover, ECI argues that even if the issue of whether public rights-of-way are used in the provision of ECI's service is relevant, the Commission should find that there is no such use as intended by the Communications Act because, while ECI's signals traverse public rights-of-way,

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[114] *Id.*

[115] *But see infra* n.174 and accompanying text, discussing the City of Chicago's letter reversing its decision that Wedgewood did not need to obtain a cable franchise.

[116] *Id.* at 13.

[117] *Id.* at 15, citing NCTA Comments at 5; Alliance Comments at 14; PROTEC/Troy Comments at 2.

[118] *Id.*

there is no physical use of the right-of-way like that of Ameritech, which constructs, maintains, owns and operates facilities in the public right-of-way.[119]

29. In response to the City of New York's statements that ECI differs from customer-programmers in that ECI own the drops and feeder lines, whereas the customer-programmers owned only the headend equipment, ECI submits that this difference is not relevant to the critical issue of ownership or control of the common carrier facilities.[120] ECI rebuts Time Warner's argument that because ECI makes all editorial and pricing decisions, ECI will necessarily have control of the common carrier's facilities by noting that video dialtone customer-programmers also made all editorial and pricing decisions, yet were found not to have control over the common carrier's facilities.[121]

30. ECI contends that the opponents' assertion that video dialtone facilities must accommodate multiple programmers[122] while ECI has no such obligation confuses the real issue, which, according to ECI, is whether ECI owns or controls the common carrier's facilities.[123] In any event, ECI states that it will permit any provider to use its drops when technologically feasible.[124]

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[119] *Id.* at 15-16, citing OpTel Comments at 2-3.

[120] *Id.* at 15. ECI also notes that some customer-programmersusing video dialtone did own the drops. *Id.*

[121] *Id.* at 19.

[122] *See* Alliance for Community Media at 7; US WEST Comments at 8; Opposition by the City of New York at 15-16.

[123] ECI Reply Comments at 19-20.

[124] *Id.* at 20.

31. ECI argues that Section 651(a)(2) expressly authorized common carriage transport of video programming without the common carrier bearing the burden of the requirements of Title VI, as long as the common carrier complies with Title II requirements.[125] ECI states that Ameritech New Media's argument that it is not providing "transmission" of video programming under Section 651(a)(2) because it is not actively involved in the selection of video programming fails for two reasons.[126] First, ECI argues that Ameritech New Media ignores the legislative history of Section 651(a)(2), which authorizes "common carrier transport of video programming."[127] In addition, ECI contends that Ameritech New Media's interpretation ignores the fact that an entity providing common carriage of video programming under Title II, by definition, would not also be actively involved in the selection of programming. In response to the City of New York's position that Section 651(a)(2) does not address the regulatory status of customer-programmers of video transport facilities, ECI states;

> . . . Section 651(a)(2) provides a clear indication that the customer-programmers do not need a franchise. Section 651(a)(2) contains a second sentence, which places a limitation on the first sentence. If Congress wanted additional limitations it would have so prescribed, especially given that it prescribed the limitation set forth in the

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[125] *Id.* at 23.

[126] *Id.* at 24.

[127] *Id.* at 24, citing H.R. Rep. No. 104-458, at 172.

> second sentence. The fact that Congress did not do so shows that the only limitation to the first sentence of Section 651(a)(2) is the second sentence to that paragraph. That second sentence provides that "[t]his paragraph shall not affect the treatment under section 602(7)(C) of a facility of a common carrier as a cable system."[128]

In response to arguments by Time Warner and the Alliance that Section 651(a)(2) is not applicable because the common carriage facilities do not go all the way to the end user, ECI notes that Section 651(a)(2) does not require the facilities to reach the end user.

32. In response to the opponents' claim that ECI is providing channel service and needs a franchise, ECI notes that under traditional channel service the cable operator has the exclusive right to use the facilities. ECI argues that it does not have the right to exclude anyone from the Ameritech's facilities, and thus ECI is not receiving channel service.[129] ECI argues that Time Warner mistakenly claims that the Commission's video dialtone proceedings established that maintenance and repair of the facilities is irrelevant in determining who is a cable operator.[130]

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[128] *Id.* at 25, quoting Communications Act § 651(a)(2), 47 C.F.R. § 571(a)(2); *see* City of New York Opposition at 16.

[129] *Id.* at 28.

[130] *Id.* at 30; citing *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd at 5072, n.27.

33. ECI responds to arguments by Time Warner and the Alliance that a ruling for ECI would open the floodgates for unfranchised service by every cable operator throughout the United States, by asserting that this will not happen because in order for cable operators to avoid a franchise requirement such cable operators would have to restructure their system to relinquish control over the portions of their systems that use public rights-of-way.[131] ECI claims that cable operators will not be willing to give up control of their systems.[132]

34. In its reply comments, OpTel contends that there is a difference between facilities ownership and the lease of facilities, and that users leasing fiber from a local exchange common carrier do not themselves become local exchange carriers.[133] OpTel argues that the owner of the facilities, the common carrier, is responsible for complying with applicable local regulations.[134] Citing the Commission's definition of channel service, OpTel also argues that the leasing by a private cable operator of common carrier transmission capacity from a local telephone company, pursuant to a tariff, is not channel service.[135] OpTel asserts that even if the Commission were to conclude that leased transport on common carrier facilities constitutes

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[131] *Id.* at 35-36.

[132] *Id.* at 36.

[133] OpTel Reply Comments at 2.

[134] *Id.* at 2.

[135] *Id.* at 3-4, citing New York Telephone Co., 10 FCC Rcd 11548, 11552 n.18 (1995) ("Channel service is the provision on a common carrier basis, by a local telephone company, of video transport services to a cable operator holding a local cable franchise, from the cable operator's headend to subscriber premises.").

the "use" of a right-of-way, the hub-to-hub use of rights-of-way would not constitute "cable service" because the "closed transmission paths" would not be used to serve subscribers.[136]

35. RCN notes that the customer-programmer in channel service retains exclusive control over the telephone company facilities used in that service, while ECI proposes to receive common carrier service that would be provided over facilities available to multiple programmers competing with ECI.[137] RCN argues that Congress intended in Section 602(7) to distinguish between the distribution of video programming directly to subscribers and the transmission of programming on a common carrier basis to facilities that distribute programming to subscribers.[138] RCN submits that the opponents' efforts to gloss over this distinction is a misreading of Section 602(7)(C).[139] RCN also notes that the *Day* case was decided before the passage of the 1996 Act and therefore, does not reflect the current state of telecommunications law.[140]

36. Wedgewood states that the Ameritech tariff is *res judicata*, given that the opponents had an opportunity to protest Ameritech Tariff No. 2, and did not, and thus cannot, two years later, now contest the tariff.[141] Wedgewood also cites the City of Chicago's decision that

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136 OpTel Reply Comments at 4-5.

137 RCN Reply Comments at 11.

138 *Id.* at 3.

139 *Id.*

140 *Id.* at 4.

141 Wedgewood Reply Comments at 2-3.

entities receiving Ameritech's supertrunking service are not required to obtain a franchise.[142] Wedgewood argues that ECI's opponents mistakenly rely on the *Day* case, which involved a closed system, unlike Ameritech's fiber and switch facilities.[143] Wedgewood contends that the opponents reliance upon channel service cases is misplaced, because those cases involved Section 214 matters before the Common Carrier Bureau and involved voice service rather than video service.[144] Furthermore, Wedgewood argues that the City of Chicago adopted a technology neutral entertainment tax, in lieu of traditional franchise fees, which preserves a level playing field from a tax standpoint and that Illinois could adopt such a bill state-wide.[145] Finally, Wedgewood argues that the Commission's definition of a cable system is not applicable in this proceeding, because Wedgewood's facilities are franchise-exempt SMATV facilities located entirely on private property.[146]

37. In its reply comments, NCTA states that the commenters that support ECI's motion offer few new arguments and no compelling reason to grant ECI's motion. NCTA notes that the only support that OpTel supplies for distinguishing between "crossing" rights-of-way and "using" rights-of-way involves the crossing of public rights-of-way by SMATV or multichannel multipoint distribution service

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[142] *Id.* at 3; *but see infra* n.174 and accompanying text, discussing the City of Chicago's letter reversing its decision that Wedgewood did not need to obtain a cable franchise.

[143] *Wedgewood Reply Comments at 3-4.*

[144] *Id.* at 5.

[145] *Id.* at 8.

[146] *Id.* at 11.

("MMDS") radio waves.[147] NCTA states that extending this concept to the use of rights-of-way by wire-based physical facilities is against long-standing Commission precedent.[148] NCTA also counters MST's assertion that no franchise is required because the common carrier facilities do not serve subscribers. NCTA states that under channel service, the telephone company providing video transport facilities does not provide video programming directly to subscribers, nevertheless, the channel service recipient has without exception been required to obtain a franchise.[149] In addition NCTA states that MST's reliance on the *Disney* case is misplaced because it involved a waiver of the Commission's program access rules involving an unrelated, unique circumstance.[150] NCTA also states that the fact that Wedgewood has obtained a letter from the City of Chicago advising that Wedgewood need not obtain a franchise to operate in the City of Chicago is irrelevant because whether Wedgewood or ECI are cable operators operating cable systems is a matter of federal law.[151] NCTA also argues that MST's reliance on the Commission's video dialtone rules and the District of Columbia Circuit's decision in *NCTA* is unwarranted because those authorities did not examine a situation remotely comparable to the one presented by ECI.[152] NCTA counters RCN's policy arguments in favor of ECI's motion by stating that such policy arguments ignore

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[147] *Id.* at 4.

[148] *Id.* at 4.

[149] *Id.* at 5.

[150] *Id.* at 6.

[151] *Id.* at 7; *but see infra* n.174 and accompanying text, discussing the City of Chicago's letter reversing its decision that Wedgewood did not need to obtain a cable franchise.

[152] *Id.* at 9.

the express statutory provisions applicable to the instant proceeding.[153] With regard to ICS's request that the Commission expand the scope of the proceeding to include carriage by private carriers in addition to common carriers, NCTA asserts that ICS's proposal is beyond the scope of the Commission's public notice regarding ECI's motion and therefore not properly an issue in this proceeding.[154]

38. Time Warner argues that ECI's interpretation of the Communications Act is incorrect because it ignores the integrated nature of the facility through which it provides service.[155] With regard to the commenters that assert that the Commission must grant ECI's motion to carry out the broad policy of the Communications Act to promote competition, Time Warner asserts that the Commission cannot promote competition where to do so directly contravenes the express language of the Communications Act.[156] Moreover, Time Warner notes that the legislative history cited by RCN is actually the legislative history of a prior version of the 1996 Act which was not enacted by Congress and which discussed a video platform similar to video dialtone that evolved to become the open video system under the 1996 Act.[157] Time Warner argues that the Commission must reject Ameritech New Media's argument that Ameritech can, without obtaining a franchise, provide programming that it selects over its own facilities without a

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153 *Id.* at 10.

154 *Id.* at 10-11; *see* Time Warner Reply Comments at 6-7.

155 Time Warner Reply Comments at 3-5.

156 *Id.* at 5.

157 *Id.* at 6.

franchise pursuant to Section 651(a)(2) of the Communications Act.[158]

39. Ameritech New Media states that the Commission recently reached essentially the same conclusion as the *Day* court, albeit in a different context. Ameritech New Media argues that, in *TBA, Inc. v. Ohio Bell Telephone Company*, the Commission held that Ohio Bell did not exceed its Section 214 authorization when it built a broadband transmission facility consisting of fiber and coaxial cable over which a cable operator provided video programming services to subscribers.[159] Ameritech New Media asserts that the Commission made clear that a telephone company leasing its broadband facilities to a cable operator is not engaged in the "transmission" of video programming when it "does not control the transmitted signals or the destination of the transmitted signals" and only "simply process[es] incoming transmissions and pass[es] those signals on to their unique destinations."[160] Ameritech New Media argues that reliance by ECI and its supporters on video dialtone decisions is incorrect because ECI is not similarly situated with video dialtone programmers since ECI controls the necessary signal generation, reception and control equipment, the selection of the programming, and "the means of distributing such video programming by virtue of their decision to purchase a tariffed telecommunications service which enables them to use a common carrier's fiber

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[158] *Id.* at 8.

[159] Ameritech New Media Reply Comments at 6.

[160] *Id.*, quoting *TBA, Inc. v. Ohio Bell Telephone Company*, 12 FCC Rcd 2876 (1997).

crossing rights-of-way to take the signal directly to their subscribers."[161]

40. The Chicago Access Corporation ("CAC")[162] submitted reply comments to respond to certain statements contained in Wedgewood's comments in support of ECI's motion. CAC objects to Wedgewood's statement that the Chicago Corporation Counsel determined that Wedgewood's arrangement "promotes competition" or otherwise benefits the public.[163] CAC argues that the Chicago Corporation Counsel's opinion that Wedgewood does not need a cable franchise and what constitutes a cable system are entitled to no deference by the Commission.[164] CAC supports the comments of those entities which argue that ECI is operating a cable system and that the use of rights-of-way (even if owned by another entity) is the critical determinant in defining a cable system.[165]

41. The Alliance reiterates its statement that ECI's proposal is indistinguishable from channel service and should be treated as such.[166] With regard to ECI's claims that there is room for eleven other programmers to utilize

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[161] *Id.* at 7.

[162] CAC is an independent nonprofit organization that administers five local non-commercial channels that reach more than 350,000 households in Chicago through cable systems operated by Chicago Cable TV/TCI and Prime Cable of Chicago. The Chicago households that receive cable service from Wedgewood do not receive CAC's programming. CAC Reply Comments at 2.

[163] CAC Reply Comments at 4.

[164] *Id.* at 4-5.

[165] *Id.* at 5.

[166] *Alliance* Reply Comments at 2.

Ameritech's fiber capacity, the Alliance states that "[e]leven empty fiber-optic lines now stand ready and waiting to carry potential competitors' video signals from their headends to a dead-end."[167] The Alliance states that, while having complete editorial control over what subscribers see through their television sets, ECI avoids the result which entitle open video systems and video common carriers to exemption from cable regulation -- competitive, common carrier access to wireline subscribers.[168]

42. The Michigan Coalition to Protect Public Rights of Way from Telecommunications Encroachments ("PROTEC") and the City of Troy, Michigan filed joint reply comments asserting that the question of whether ECI needs a franchise is a matter of state law that the Commission is not competent to address.[169] Should the Commission proceed to address the federal question explicitly raised by ECI's motion, PROTEC/Troy argues that the Commission should exercise care to avoid ruling on related questions of state law.[170]

43. US West asserts that its fundamental point remains unrebutted, that a multichannel video programmer using common carrier facilities to provide programming to multiple subscribers always has been subject to franchise, or franchise-like, requirements and the exception that ECI purports to find is nonexistent.[171] Moreover, US West

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[167] *Id.* at 2.

[168] *Id.* at 3.

[169] PROTEC/Troy Reply Comments at 3.

[170] *Id.* at 3.

[171] US West Reply Comments at 1.

argues that ECI's purported exception is equally inconsistent with Congress' most recent expression on this topic through the imposition of franchise-like obligations on open video system operators.[172]

44. On April 15, 1997, Ameritech New Media submitted a written *ex parte* submission pursuant to Section 1.1206 of the Commission rules responding to certain "egregious and inappropriate allegation[s]" contained in ECI's reply comments.[173] Thereafter, on April 30, 1997, CAC also submitted a written *ex parte* submission attaching a copy of a letter from the Chicago Corporation Counsel to the president of Wedgewood Communications, Inc. stating that "the position set forth in the 1995 letter no longer represents the view of this office. . . . It is our determination that the operations of Wedgewood require a City of Chicago cable franchise."[174] In addition, numerous *ex parte* presentations to the Commission were made by interested parties, including cable operators, non-cable video distributors and representatives of local franchising authorities.

IV. DISCUSSION

45. The essential facts underlying ECI's service are not disputed by the parties. ECI serves approximately 1,600 subscribers at 12 MDUs with headend facilities located entirely on private property and ECI interconnects with Ameritech's fiber optic facilities inside the private property line. Prior to obtaining service from Ameritech,

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[172] *Id.* at 2.

[173] Ameritech New Media *Ex Parte* Presentation at 1.

[174] *CAC Ex Parte* Presentation, Exhibit 1 at 1.

ECI served its subscribers utilizing a separate headend at each MDU location. ECI purchases and Ameritech provides Supertrunking video transport service. Pursuant to this service, Ameritech transports ECI's signal over public rights-of-way to the subscribers ECI serves. Ameritech possesses authority to provide its Supertrunking video transport service as a common carrier in the public rights of way. Ameritech controls all routing of ECI's communications when they travel over Ameritech's facilities. Inside the MDU private property line, ECI connects with Ameritech's facilities and owns, controls and maintains the final portion of facilities which terminate at the subscriber's television set. Ameritech's Supertrunking facilities are capable of providing service to several other customers. ECI has committed to make its drops available to competing video programming providers, where technologically feasible. Given these circumstances, ECI seeks a ruling that it is not a cable operator subject to the requirements of Title VI of the Communications Act. ECI argues that Section 651(a)(2) (common carriage of video transport) and Section 602(7)(B) (private cable exemption to the definition of cable system) independently support its argument that it is not a cable operator. We address each argument below.

A. Common Carriage of Video Traffic

46. Section 651 of the Communications Act sets out four options for the provision of video programming services provided by common carriers. Such carriers may: (1) provide video programming to subscribers through radio communication under Title III of the Communications Act;[175] (2) provide transmission of video programming on a

[175] Communications Act § 651(a)(1), 47 U.S.C. § 571(a)(1).

common carrier basis under Title II of the Communications Act;[176] (3) provide video programming as a cable system under Title VI of the Communications Act;[177] or (4) provide video programming by means of an open video system under Section 653 of the Communications Act.[178] Section 651(a)(2) states:

> To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of title II and section 652, but shall not otherwise be subject to the requirements of this title. This paragraph shall not affect the treatment under section 602(7)(C) of a facility of a common carrier as a cable system.[179]

47. ECI asserts that Congress specifically intended Section 651(a)(2) to allow SMATV operators to distribute video programming without using public rights-of-way through a common carrier video transport to facilities located solely on private property without complying with a cable operator's obligations.[180] ECI argues that, since it receives service from Ameritech pursuant to Section 651(a)(2), ECI is not subject to the requirements of Title VI.

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[176] *Id.* at § 651(a)(2), 47 U.S.C. § 571(a)(2).

[177] *Id.* at § 651(a)(3), 47 U.S.C. § 571(a)(3).

[178] *Id.* at § (a)(3)-(4), 47 U.S.C. § 571(a)(3)-(4).

[179] *Id.* at § 651(a)(2), 47 U.S.C. § 571(a)(2).

[180] ECI Motion at 10; ECI Reply Comments at 22-27.

48. We disagree with ECI's contention. We cannot perceive an intent, express or inferred, on the part of Congress to address in Section 651(a)(2) the regulatory status of video distributors that purchase common carriage of video traffic service. Instead, Section 651(a)(2) expressly exempts from the requirements of Title VI common carriers, such as Ameritech, that provide a common carrier service through which their facilities are used by video providers to transmit their signal.[181] Section 651(a)(2) does not expressly address the obligations of video distributors which purchase such service and use the common carrier facilities to transmit video programming directly to subscribers. Section 651(a)(2) specifically states that it does "not affect the treatment under Section 602(7)(C) of a facility of a common carrier as a cable system."[182] Section 602(7)(C) states that "a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act . . . shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers. . . ."[183] Given this language, we cannot reasonably interpret Section 651(a)(2) as an exemption shielding ECI from complying with the obligations of Title VI, including the cable franchise obligation. Accordingly, we next address whether ECI is a cable operator to which the cable franchise requirement and other cable operator obligations apply.

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[181] We find that Ameritech is providing common carriage of video traffic in accordance with Section 651(a)(2) of the Communications Act. *See* Communications Act § 651(a)(2), 47 U.S.C. § 571(a)(2).

[182] Communications Act § 651(a)(2), 47 U.S.C. § 571(a)(2).

[183] Communications Act § 602(7)(C), 47 U.S.C. § 522(7)(C).

B. ECI's Status as a Cable Operator

49. To be subject to a cable operator's obligations, including the franchise requirement of Section 621(b), an entity must be a cable operator, which is defined as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.[184]

None of the parties to this proceeding contest that ECI provides cable service to its subscribers. We find that ECI provides cable service within the meaning of Section 602(6), because it provides "(A) one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[185]

50. Although we find ECI provides cable service, it is a cable operator only if it provides such service over a "cable system," in which it owns a significant interest directly or through an affiliate, or which it controls or is responsible for the management or operation. As explained

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[184] Communications Act § 602(5), 47 U.S.C. § 522(5).

[185] Communications Act § 602(6), 47 U.S.C. § 522(6).

below, we conclude, based on the facts before us that ECI is not operating a cable system.

51. Section 602(7) enumerates the elements of a cable system. In pertinent part, the Communications Act defines the term cable system as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.[186]

The Communications Act provides several exemptions to the definition of what constitutes a cable system. The exemption at issue in this proceeding, the private cable exemption, set forth at Section 602(7)(B) provides that "a facility that serves subscribers without using any public right-of-way" is not a cable system.[187]

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[186] Communications Act § 602(7), 47 U.S.C. § 522(7). A subscriber is defined in Section § 76.5(ee) of the Commission's rules as a member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it. 47 C.F.R. § 76.5(ee).

[187] Communications Act § 602(7)(B), 47 U.S.C. § 522(7)(B). As enacted in the 1984 Act, the definition of a cable system excluded "a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way. . . ." Communications Act § 602(7), 47 U.S.C. § 522(7)(B), *amended by* Telecommunications Act of 1996 § 301(a)(2), 47 U.S.C. § 522(7)(B). The 1996 Act amended this exclusion retaining only the requirement that such systems not use "any public right-of-way."

52. Consistent with this statutory exemption, in analyzing the definition of the term "cable system," the Commission has stated that:

> [t]he dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public-rights of way in the communities they serve."[188]

Thus, through the policies enumerated by the Communications Act, the definitions reflecting these policies, and the Commission's decisions, the cable franchise requirement of Section 621(b) is inextricably linked to the use of public rights-of-way.[189] In addition, there is evidence in the legislative history that Congress did not intend users of non-cable-franchised common carrier services to be subject to Title VI requirements. In its comments, RCN cites the legislative history of earlier versions of Section 302 of the 1996 Act and Section 651 of the Communications Act, which states:

> to the extent that the carrier provides programming through a common

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[188] *Definition of a Cable Television System*, 5 FCC Rcd at 7639.

[189] *See Order on Reconsideration*, 7 FCC Rcd at 5072, stating that the LEC "facilities used to provide video dialtone service . . . would all be governed by common carrier regulations that incorporate the same concerns about public safety and convenience and use of public rights-of-way that provide a key justification for the cable franchise requirement."

> carrier platform, neither it, *nor any video programming provider making use of such platform* shall be deemed to be a cable operator providing cable service. Under current law, a programmer who uses a video dialtone network to deliver programming to subscribers is not a cable operator.[190]

While we recognize, as Time Warner points out in its comments, that the legislative history cited by RCN refers to a proposal relating to what evolved into the open video system option, we are not persuaded that RCN's reference is inapplicable to the instant proceeding.[191] The cited legislative history can be interpreted as a congressional indication that video distributors that transmit their signals over public rights-of-way through the use of a LEC's common carrier platform not be deemed cable systems.

53. We have previously determined that the term "cable operator" does not encompass an entity that maintains reception and transmission equipment wholly on private property and that transmits its video signals through the public rights-of-way solely by means of a local exchange carrier's facilities that are made available on a common carrier basis. Under the video dialtone framework, local telephone companies were permitted to make available, on a nondiscriminatory common carrier basis, a basic platform that delivered video programming and other services from

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[190] RCN Comments at 5, quoting S. Rep. No. 104-230, 104th Cong., 1st Sess. 37 (1995) (emphasis RCN).

[191] *See* Time Warner Comments at 6.

the separately-owned headend facilities of multiple customer programmers to end-user subscribers.[192] In *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58,* Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry ("*First Report and Order*"), the Commission determined that neither a LEC providing video dialtone services nor its customer/programmer was required under Section 621(b) to obtain a cable franchise in order to offer service.[193] The Commission determined that the customer/programmers were not cable operators subject to the franchise requirement because "they neither own a significant interest in the telephone company broadband facilities, or control, or are responsible for the management and operation of those facilities. . . ."[194] In *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58,* Memorandum Opinion and Order on Reconsideration ("*Order on Reconsideration*"), the Commission addressed reconsideration requests on the issue of whether LEC video dialtone providers should be required to obtain local cable franchises.[195] Although the Commission was not asked to reconsider the cable franchise requirement as it pertained to video dialtone customer/programmers, the Commission indirectly touched on this issue by holding that:

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[192] *Second Report and Order*, 7 FCC Rcd at 5783-85.

[193] *First Report and Order*, 7 FCC Rcd 300, 324-25 (1991).

[194] *Id.* at 327-28 (footnotes omitted). The Commission also held that the cable franchise requirement did not apply to the LEC video dialtone service provider because the LEC is not providing video programming service directly to subscribers and therefore acted simply as a conduit in providing broadband common carrier based service that enables customer/programmers to reach subscribers. *Id.* at 327.

[195] *Order on Reconsideration*, 7 FCC Rcd 5069 (1992).

> [w]e conclude further that video dialtone facilities typically would not constitute a "cable system" for the additional reason that they will not ordinarily include the necessary signal generation, reception and control equipment. As a video dialtone provider, a telephone company generally will not control this "headend equipment," which is associated with selection and provision of video programming. It will be the video programmers, rather than the telephone company, who will generate and control the signal sent over transmission facilities made available by the telephone company. As long as the facilities are not used by the telephone company for the direct provision of video programming, the system does not qualify as a cable system.[196]

54. In upholding the Commission's video dialtone policies as set forth in the *First Report and Order* and the *Order on Reconsideration*, the District of Columbia Circuit in *NCTA* stressed the importance of separate ownership of the headend and transmission facilities stating that:

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[196] *Id.* at 5072-73 (footnotes omitted); *see infra* §§ 57-58, discussing why ECI's service does not closely resemble common carrier channel service.

> [w]here the "closed transmission paths" and "associated" head-end equipment are owned and controlled by different entities (as in video dialtone), and where different configurations of equipment would be used to move video programming from the different providers to the different customers, the concepts of a single, integrated system and unified control are not present.[197]

55. We believe the District of Columbia Circuit's affirmance of our decisions in the video dialtone context supports the conclusion that ECI is not a cable operator. The court's decision is based on principles that are present here. First, there is an absolute separation of ownership between ECI's headend facilities, which are located entirely on private property, and the transmission facilities owned and controlled by Ameritech. ECI has no financial interest in Ameritech and Ameritech has no financial interest in ECI. The companies are in no way affiliated. Ameritech takes no part in programming selection. ECI retains total control over the selection of programming offered to its subscribers. After delivery of its signal to Ameritech at the junction box, ECI surrenders control to Ameritech, retaining only the right to designate the delivery points, which Ameritech must approve.[198] ECI can provide service only to those locations where Ameritech has facilities or is willing to construct facilities in furtherance of its Supertrunking service.[199] In

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[197] *NCTA*, 33 F.3d at 74.

[198] ECI Motion, Exhibit 1.

[199] *Id.*

short, there is absolutely no evidence that the relationship between Ameritech and ECI is other than a "carrier-user" relationship.[200] In addition, Ameritech also has capacity to serve multiple customers in the same MDUs -- ECI asserts that it uses one strand of fiber in a twelve fiber bundle.[201] We acknowledge that the relationship between Ameritech and ECI does not absolutely mirror that of a video dialtone operator and a customer programmer. For example, in the instant circumstances, at least initially, there will be only a single stream of programming from a single programming provider. However, such distinctions are not legally relevant to the issue of whether a single, integrated cable system is present.

56. We acknowledge Time Warner's argument that the definition of the term cable system, as codified by the 1984 Act, intentionally omitted the Commission's previous requirement that all portions of a cable system be under common ownership or control.[202] Accordingly, Time Warner contends that the separate ownership of ECI's headend facilities and Ameritech's transmission facilities does not preclude a finding that ECI is a cable operator of a cable system.[203] While Time Warner's argument is correct as far as it goes, we find that it does not compel a different

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[200] *See, e.g.*, 47 C.F.R. § 63.54(c) & Note (repealed 1996), discussing the "carrier-user" relationship.

[201] Ameritech New Media asserts that, while ECI's programming actually occupies only one fiber strand, Ameritech, out of redundancy concerns, assigns a second fiber for each fiber used. See March 4, 1998 Ameritech New Media *Ex Parte* Presentation. After accounting for ECI's use of the fiber bundle, Ameritech New Media maintains that 10 strands remain for use by other Ameritech customers.

[202] Time Warner Opposition at 17.

[203] Id.

conclusion in this case. As explained herein, Ameritech exercises complete stewardship over the transmission facilities that actually traverse the public right-of-way.[204] It has no affiliation whatever with ECI and no obligation to use the facilities exclusively for ECI. Under all these circumstances, we find that ECI is not a cable operator.

57. Several parties[205] argue that Ameritech's Supertrunking service more closely resembles common carrier channel service than video dialtone, and that the Commission has always required that channel service recipients comply with all Title VI requirements. We disagree. Ameritech's Supertrunking service does not have the traditional characteristics of channel service. Channel service generally entailed a telephone company building a video distribution system or systems, if the telephone company received multiple channel service requests, from the interconnection with the recipient's headend to the subscriber's premises and leasing it to a cable operator.[206] Channel service facilities are built-to-order facilities constructed solely for the use of a particular channel service

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[204] *See infra* ¶63, discussing *AT&T Communications of the Southwest, Inc. v. City of Austin, Texas,* No. A97-CA-532 SS (W.D Tex. June 4, 1998) (holding that new entrant that leases capacity in the right-of-way from incumbent local LEC, which remains responsible for the installation, operation, maintenance and repair of such capacity, does not use the right-of-way in a manner recognized by the Communications Act).

[205] Time Warner, City of New York, Alliance, and US West.

[206] *First Report and Order*, 7 FCC Rcd at 327; *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58*, Second Report and Order, Recommendation To Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5787, n.21 (1992) ("*Second Report and Order*"); *see also NCTA*, 33 F.3d at 71.

recipient.[207] The channel service facilities are constructed to take the recipient's signal to the destinations designated by the recipient.

58. This stands in distinct contrast to the service ECI receives from Ameritech. ECI purchases a tariffed service provided over facilities the large majority of which were constructed by Ameritech prior to marketing its Supertrunking video service and some of which were constructed in response to ECI's request for service.[208] Thus, the fiber optic facilities used to provide service were not wholly constructed at ECI's request. In addition, because such construction, at a minimum, consists of twelve-strand fiber bundles, the facilities constructed to provide service to ECI do not benefit any particular programming provider, Moreover, Ameritech does not own and control the facilities that go directly to the subscriber's premises. ECI owns and controls the facilities from its interconnection with Ameritech inside the private property line to the subscriber's television. Ameritech's service is provided over facilities totally owned, controlled and maintained by Ameritech. Also in contrast to channel service, several other video

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[207] *See New York Telephone Co.*, 10 FCC Rcd at 11552. The Commission has described channel service as:

> [T]he provision, on a common carrier basis, by a local telephone company, of video transport services to a cable operator holding a local cable franchise, from the cable operator's headend to subscriber premises. . . . Channel service differs from video dialtone service insofar as channel service facilities are deployed for the exclusive use of the franchised cable operator, whereas video dialtone facilities must accommodate multiple video programmers.

Id. (citations omitted).

[208] *See* ECI Reply, Exhibit 1 (Ameritech Supertrunking Video Service marketing brochure).

programming distributors may purchase on demand the same service provided to ECI under the same prices, terms and conditions. We believe these factors distinguish ECI's service from traditional channel service and render the opponent's analogy unpersuasive. Again, we find the District of Columbia Circuit's opinion in *NCTA* instructive. In response to claims that the Commission's video dialtone decisions would permit channel service recipients to restructure their service to avoid the cable franchise requirements, the District of Columbia Circuit stated that:

> [a] cable operator could presumably do that, but it would at the same time fundamentally alter the nature of its business, offering the public programs rather than channels of programming. It would also have to give up control over, including the right to exclude others from, the channel capacity that it formerly leased, and depend upon the capacity of the public switched network in order to reach its customers. In these important ways, video dialtone and channel service are not . . . functionally indistinguishable.[209]

59. We reject contentions that the Commission's video dialtone decisions have no precedential value in light of Congress' express repeal of video dialtone in the 1996

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[209] *NCTA*, 33 F.3d at 75.

Act.[210] The amendments to the Communications Act by the 1996 Act do not alter the analysis of Section 602(7) contained in the Commission's video dialtone orders and the District of Columbia Circuit's *NCTA* decision.[211] These decisions and *NCTA* analyzed the video dialtone framework in the context of the definition of cable system set forth in Section 602(7) to determine whether the video dialtone system operator or customer/programmers were cable operators of cable systems, necessitating that either or both of these parties obtain a cable franchise. The reasoning and analysis that formed the underpinning of the Commission's video dialtone decisions continues to have applicability in interpreting the definition of "cable system."

60. Ameritech New Media argues that, in *TBA v. Ohio Bell*, the Commission considered facts similar to the instant proceeding and concluded that a common carrier does not engage in transmission when it does not control the transmitted signals or their destination.[212] We disagree. In *TBA*, the Commission addressed whether Ohio Bell violated its Section 214 grant of authority in connection with the construction, operation and extension of lines of a broadband cable television transport system for North Coast Cable Ltd. ("NCC").[213] NCC purchased the coaxial cable portion of the

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[210] *See* 1996 Act § 302(b)(3), stating that, on the date of enactment, "[t]he Commission's regulations and policies with respect to video dialtone requirements. . . shall cease to be effective."

[211] *See supra* n.187, discussing the 1996 Act amendments to the cable system definition.

[212] Ameritech New Media Reply Comments at 6, citing *TBA v. Ohio Bell*, 12 FCC Rcd 2876 (1997).

[213] *TBA v. Ohio Bell*, 12 FCC Rcd at 2876-77.

system from Ohio Bell.[214] Although record title remained with Ohio Bell, all other incidents of ownership were conveyed to NCC.[215] Thereafter, NCC extended a line of the coaxial portion of the system into a neighboring community and began competing with another cable operator, TBA, Inc. ("TBA").[216] TBA filed a complaint alleging that Ohio Bell violated its Section 214 authority when NCC extended the line outside of Ohio Bell's telephony service area and into TBA's franchise area.[217] The Common Carrier Bureau ("CCB") concluded that TBA failed to establish a Section 214 violation, and TBA filed an application for review of the CCB's order to the Commission.[218] On review, the Commission upheld the CCB's decision.[219] Our review of that decision indicates that Ohio Bell clearly provided channel service to NCC. Accordingly, because Ameritech provides common carriage video transport, not channel service, to ECI, we find the reasoning of *TBA* to be inapplicable to ECI's Motion.

61. We conclude that ECI's facilities and Ameritech's facilities do not constitute a single, integrated cable system.[220] ECI is not a cable operator as defined by Section 602(5) of the Communications Act because it does not provide service to its subscribers through a cable

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214 *Id.* at 2877.

215 *Id.*

216 *Id.*

217 *Id.* at 2878.

218 *Id.*

219 *Id.* at 2880-82.

220 *See* NCTA, 33 F.3d at 74.

system.[221] Because only cable operators are required by Section 621(b) to obtain cable franchises and comply with the other Title VI requirements, ECI is not required to obtain a cable franchise or otherwise comply with a cable operator's obligations under Title VI of the Communications Act.

62. We find also that ECI qualifies for the private cable exemption of Section 602(7)(B), which provides that "a facility that serves subscribers without using any public rights of way" does not constitute a cable system under Section 602(7).[222] That ECI's signal moves across public rights-of-way to reach its subscribers does not by itself render ECI the operator of a cable system. The issue is whether the transport by Ameritech of ECI's signal constitutes a use of such rights-of-way by ECI as contemplated by Section 602(7)(B). It is Ameritech, not ECI, that uses the rights-of-way, as the Commission and courts have interpreted the term, whether for installations, repair or maintenance of its facilities. Ameritech does not have unfettered use of public rights-of-way and must comply with a range of safety, convenience, and other requirements. The public safety and convenience and management of public rights-of-way, provide a key premise for the cable franchise requirement.[223] Because Ameritech possesses the authority to operate in the right-of-way and to transmit ECI's, or other video distributors', signals, we conclude that the underlying premise tying the franchise requirement to the

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[221] Because we find that ECI satisfies the private cable exemption contained in Section 602(7)(B), we need not address ECI's Section 602(7)(C) common carrier exemption arguments.

[222] Communications Act § 602(7)(B), 47 U.S.C. § 522(7)(B).

[223] *NCTA*, 33 F.3d at 73, citing *Order on Reconsideration*, 7 FCC Rcd at 5072.

use of public rights-of-way is not present in ECI's circumstances, and that requiring ECI to obtain a franchise would be needlessly duplicative. As discussed above, a cable operator's construction in and use of public rights-of way is an important factor, and advantage, underlying the Communication Act's requirement that all cable operators be franchised. ECI engages in neither of these activities, relying on Ameritech's authorization, construction and maintenance of its right-of-way facilities. We cannot conclude that ECI's mere interaction with Ameritech's authorized facilities in the public right-of-way is the type of use to which Congress spoke in defining what constitutes a cable system. Any conclusion to the contrary would be inconsistent with the *NCTA* decision, where the District of Columbia Circuit held that a programmer's "use" of LEC common carrier facilities in the public rights-of-way does not trigger the cable franchise requirement. We find our conclusion in concert with the amendments to the private cable exemption effected by Congress in the 1996 Act. By removing the requirement that private cable operators serve only commonly owned, controlled, or managed MDUs,[224] Congress clearly indicated its desire that the private cable exemption be more broadly available than prior to the 1996 Act.

63. The United States District Court for the Western District of Texas' recent decision in *AT&T Communications of the Southwest v. City of Austin* further supports our holding.[225] In that case, Southwestern Bell

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[224] *See supra* n.187, discussing the 1996 Act amendments to the private cable exemption.

[225] *AT&T Communications of the Southwest, Inc. v. City of Austin, Texas*, No. A97-CA-532 SS (W.D Tex. June 4, 1998).

Telephone Company ("SWBT") leased facilities to AT&T of the Southwest, Inc. ("AT&T") for the provision of local telephone service by AT&T.[226] Based on AT&T's occupancy of SWBT's facilities located in public rights-of-way, the City of Austin claimed that AT&T must obtain a local franchise before offering local telephone service.[227] Arguing that Section 253 of Communications Act precludes such barriers to entry by localities, AT&T sought and was granted a preliminary injunction enjoining the City's franchise requirement.[228] In granting a permanent injunction, the District Court stated:

> AT&T transmits signals consisting of electrons and lightwaves, which travel through copper and fiber optic lines, cables, and link switches located *in* (as opposed to *above*) the City's rights-of-way. The City contends these electrons and lightwaves constitute both a use and an occupancy of the public rights-of-way. The distinction between "in" and "above" is due to the Court's reliance in its preliminary injunction order on *In the Matter of Definition of a Cable Television System* . . . a Federal Communications Commission ("FCC") decision which held that the "mere passing over of . . . a right-of-way by electromagnetic radiation" does not constitute the "use" of the right-of-way. The City

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[226] *AT&T Communications of the Southwest, Inc. v. City of Austin, Texas*, 975 F. Supp. 928, 934 (W.D. Tex 1997).

[227] *Id.* at 934-35.

[228] *Id.* at 942-43.

> argues the FCC decision, which involves wireless communication passing over a right-of-way, is materially different from the situation here in which communication travels through wires located in the City's rights-of-way.
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> [T]he manner in which electrons travel -- in, through, out, above, below, beyond, between, around, over, under, on, within, without -- is irrelevant. The essential point is that AT&T will not erect telephone polls [sic] or dig holes in the City's streets in order to install, maintain, operate or repair SWBT's network (*i.e.*, wires, cables, and switches) because those rights and duties belong to SWBT, not to AT&T. When AT&T purchases wholesale services and network functionalities from SWBT, SWBT provides those services to AT&T through SWBT's network, and AT&T then resells those services to consumers. True, when AT&T's customers place a local telephone call, electromagnetic radiation travels through SWBT's network, but that is not to say that AT&T owns the electromagnetic radiation travelling through the network (a question which is better left to the ruminations of philosophers rather than a court of law). The Court once again rejects the City's bizarre definition of the term "use."[229]

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[229] *AT&T v. City of Austin*, No. A97-CA-532 SS, at 5-7 (emphasis original), quoting *In the Matter of Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990).

64. Our decision is consistent with the pro-competitive mandate imparted on the Commission by Congress in enacting the 1996 Act. Indeed, the Conference Report states: "[r]ecognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs."[230] The 1996 Act directs that advanced telecommunications service be obtained through robust competition rather than through regulatory oversight.[231] ECI's service is a statutorily permissible option which will, where possible, promote competition in the MVPD marketplace and enhance consumer choice.

C. Miscellaneous Matters

65. We reject ICS' request to expand the scope of this proceeding to consider whether private cable operators should be allowed to use the fiber optic facilities of any independent provider, both common carrier and private carrier. We also reject MTS' request that the Commission grant franchised cable operators the option to transfer their cable plant that use public rights-of-way to unaffiliated third parties. Both requests are beyond the scope of this proceeding.

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[230] Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 172 (Feb. 1, 1996).

[231] *Id.* at 175.

66. We disagree with PROTEC/Troy's assertion that whether or not ECI needs to obtain a cable franchise is a question of state law that the Commission is not competent to address. The Commission is charged with administering and enforcing the Communications Act. Incumbent in such jurisdiction is interpreting the applicability of the provisions of the Communications Act such as the definition of cable operator and cable system contained in Section 602 as those terms relate to the franchising requirement of Section 621(b)(1) of the Communications Act. This decision does not reach the issue of state and local authority over video distributors such as ECI.

D. Motion to Dismiss

67. The Cities of Chicago, East Lansing, and Meridian (the "Cities") filed a Joint Motion to Dismiss ECI's Motion arguing that ECI breached its duty of truthfulness and candor to the Commission.[232] The Cities assert that ECI has breached that duty by misrepresenting and failing to candidly disclose that construction of new facilities is necessary in the majority of cases for Ameritech to provide service to ECI and other Supertrunking video transport service customers.[233] The Cities cite two statements made by ECI in its Reply Comments which state:

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[232] NATOA, PROTEC, the Texas Coalition of Cities on Franchised Utility Issues ("TCCFUI"), and the Cities of Dallas and St. Louis filed a Joint Statement in Response to the Joint Motion to Dismiss in which they argue that the Commission should reexamine its procedures for handling CSR petitions, such as ECI's petition, which involve relatively small municipalities with limited resources, but which raise broad preemption issues that have nationwide impact. Joint Statement at 2-5.

[233] Joint Motion to Dismiss at 2.

> As also previously explained, unlike traditional channel service, Ameritech did not construct its system for ECI to provide cable service but instead is simply now allowing ECI, Wedgewood and presumably others to transport video over pre-existing Ameritech facilities that are also used for the transport of non-video services.
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> * * *
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> Therefore, a ruling against petitioners will lead to the underutilization of the common carriers facilities, as such facilities would be able to support a viable service that cannot take off because of regulation.[234]

The Cities also cite several similar statements made by parties supporting ECI's Motion.[235] The Cities request that the Commission either dismiss ECI's Motion on the basis of "facts already known," or, in the alternative, conduct a hearing for the purpose of determining whether ECI made material misrepresentations or omitted to disclose relevant information in its filings with the Commission.[236]

68. In its Opposition, ECI asserts that the Cities' Joint Motion to Dismiss is frivolous and maintains that the statements the Cities complained of are not false.[237] With regard to the first alleged misrepresentation regarding extension of Ameritech facilities to provide it service, ECI asserts that the Cities:

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[234] *Id.*, quoting ECI Reply Comments at 29 & 34.

[235] *Id.* at 3-4, quoting OpTel Comments at 3; ICS Comments at 9-10.

[236] *Id.* at 17.

[237] ECI Opposition at 4.

> . . . focus solely on the fact that not every foot of Ameritech's facilities were pre-existing, which ECI never stated in the first place. It is axiomatic that when two facilities such as Ameritech's and ECI's are connected there ordinarily will be some small extension of the lines to connect to the other facility.[238]

ECI further argues that the small extensions of line necessary to connect Ameritech's pre-existing facilities is not relevant to, or inconsistent with, ECI's argument that it need not obtain a franchise because the lines added by Ameritech are part of Ameritech's common carrier facilities, all of which are owned, controlled, and managed by Ameritech.[239] ECI states that, while the Cities allege that ECI withheld material information from the Commission, it was ECI that first brought the information to the Commission's attention through its *ex parte* submissions.[240] In these submissions, states ECI, the Commission was clearly informed of the fact that Ameritech was required to install short extensions to connect its facilities with ECI.[241] ECI states that these submissions included a map clearly detailing the portions of Ameritech's system which preexisted ECI's service and those facilities which were constructed to provide service to ECI.[242] With regard to the second alleged misrepresentation concerning the underutilization of Ameritech's facilities, ECI

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[238] *Id.* at 4-5.

[239] *Id.* at 5.

[240] *Id.* at 5.

[241] *Id.* at 5-6, citing ECI March 18 & 20 *ex parte* submissions.

[242] *Id.* at 6.

states that the Cities' claim is "absurd as obviously those common carrier facilities that are currently utilized to provide service to entities such as ECI and Wedgewood will not be so utilized if the Commission rules against ECI."[243]

69. As the Cities correctly acknowledge, all parties to Commission proceedings have an affirmative duty of truthfulness and candor.[244] We fail to perceive, however, how ECI has breached this duty. At the outset of our discussion, we note that the disputed statements are immaterial to our decision today. As discussed above, Ameritech is providing ECI with a common carriage video transport service over facilities wholly owned, controlled and managed by Ameritech.

70. We first address the Cities' argument that ECI has been less than truthful regarding Ameritech's construction of facilities. A party's duty of truthfulness and candor does not extend to pleading facts that are so patently obvious that their inclusion does not serve to inform the Commission and needlessly inflates pleadings. The Commission did not approach ECI's Motion in a vacuum, and was not under the misapprehension that Ameritech had constructed all the facilities needed to serve ECI, or other similarly-situated programming providers, at all present and future locations such that the two facilities need merely to be connected to commence service. To argue that ECI had an affirmative duty to dissuade the Commission of this fact is

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[243] *Id.* at 4.

[244] Joint Motion to Dismiss at 6-7, citing *RKO General, Inc. v. FCC*, 670 F2d 215, 232 (D.C. Cir. 1981); *Sea Island Broadcasting Corp. v. FCC*, 627 F2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 843 (1980); *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1101-04 (1978); 47 C.F.R. § 1.17.

unreasonable. The Commission correctly read ECI's statements that Ameritech did not construct its system with the intent of permitting ECI to provide cable service and that ECI's service was provided "over pre-existing Ameritech facilities" in their proper context -- that Ameritech did not construct the primary facilities necessary to provide service to ECI. The fact that Ameritech had to construct short extensions to connect with ECI's facilities does not render ECI's statements untrue or misleading.

71. We also acknowledge that, despite the voluminous record amassed in this proceeding, the issue of the existence and scope of Ameritech's extensions to serve ECI was not raised by any party until almost one year after ECI filed its Motion. The Commission finds it difficult to posit that all parties to this proceeding believed that ECI was receiving service via facilities that completely pre-existed its service request to Ameritech. We find it far more likely that these parties correctly read ECI's statement in its intended context. When the issue of the existence and scope of Ameritech extensions to serve ECI was raised before the Commission, ECI promptly filed information with the Commission detailing such extensions.

72. We next address the Cities' argument that ECI's statement concerning underutilization of facilities was false or misleading. We find ECI's statement in this regard to be a reasonable characterization of the facts. To the extent that Ameritech is prevented from providing its common carriage video transport service to ECI, facilities will not be used to serve ECI and thus not utilized to capacity. Finally, to the extent that the Cities base a portion of their Joint Motion to Dismiss on the allegedly false statements of parties supporting ECI's Motion, we find that, while false statements in a proceeding are always of concern

to the Commission, such statements do not serve as grounds to dismiss the motion of a party that did not render such statements. Accordingly, the Cities Joint Motion to Dismiss ECI's motion for declaratory ruling based on a breach of ECI's duty of truthfulness and candor to the Commission is denied. For the foregoing reasons, we also deny the Cities alternate request for a hearing for the purpose of determining whether ECI made material misrepresentations or omitted to disclose relevant information in its filings with the Commission.

V. CONCLUSION

73. In granting ECI's motion for a declaratory ruling, we are cognizant that other similarly-situated operators have embraced the same interpretation as ECI. In so stating, we caution other MVPDs that the instant decision is expressly limited to the facts before the Commission as presented by ECI. In this regard, we note that: (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.

VI. ORDERING CLAUSES

74. Accordingly, **IT IS ORDERED** that the Motion for a Declaratory Ruling of Entertainment Connections, Inc. **IS GRANTED** as described in this Memorandum Opinion and Order, and in all other respects denied.

75. **IT IS FURTHER ORDERED** that the Joint Motion to Dismiss Proceeding filed by the City of Chicago, Illinois, Meridian Charter Township, Michigan, and the City of East Lansing, Michigan **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Joint Statement of Chairman Kennard, Commissioner Ness, Commissioner Furchtgott-Roth, and Commissioner Powell

In the Order we issue today, we decide that Entertainment Connections, Inc., is not a cable operator as defined by the Communications Act and therefore is not required to obtain a cable franchise.

Although strong arguments have been presented on both sides of the question of whether a franchise is required by ECI, a video provider who leases video trunking service from Ameritech, we ultimately conclude that no franchise is required. This decision, while difficult, hinges on our factual judgment that the facilities of ECI and Ameritech are separate and cannot be considered as one, integrated facility that would trigger the franchise requirements of Section 621(b)(1) of the Communications Act. Thus, with due respect to the points made by Commissioner Tristani in her dissent, because we differ on this fundamental view of the facts, we reach an opposite conclusion on the application of the law.

There are three key reasons that compel our legal judgment. First, ECI is exempt from the franchise requirement by Section 602(7)(B) of the Act, which provides that "a facility that serves subscribers without using any public rights of way" does not constitute a cable system. Second, the Ameritech facilities comprise a large majority of the distribution network used by ECI. ECI does not manage, control, or otherwise direct the use of Ameritech's facilities and the two unaffiliated companies are in a "carrier-user" relationship to one another. Third, the Ameritech facilities --

twelve-strand fiber trunks of which ECI uses no more than two strands -- are available to other video providers that might serve some or all of the same locations served by ECI, and ECI has offered to make its facilities available to competitive providers.

With regard to policy, as Commissioner Tristani's dissent notes, the decision highlights important issues surrounding dual federal-local jurisdiction under the Communications Act. This is an area where proper deference to local officials is critical in light of the extensive physical facilities and substantial construction upon and use of public rights-of-way. We remain committed to upholding the legitimate rights of local governments to manage their rights of way and receive compensation for their use.

Under the facts presented here, however, we believe the local government can and must exercise these rights in the context of its relationship with the local exchange carrier that owns, installs, and maintains the facilities in the public rights-of-way, rather than via franchising and regulation of the video programmer that makes no such use of the rights-of-way. We believe this reasoning, and today's decision, follow from the judicial precedent cited in the order and are consistent with the decision by Congress, in the Telecommunications Act of 1996, to expand the "private cable" exception to the cable franchising requirement. *See* 47 U.S.C. § 522(7)(B). Our decision makes clear our commitment to ensure competitive opportunity while safeguarding the discretion and responsibilities of local officials.

DISSENTING STATEMENT OF COMMISSIONER GLORIA TRISTANI

In the Matter of Entertainment Connections, Inc., Motion for Declaratory Ruling

I dissent. Today's decision is wrong as a matter of law and misguided as a matter of policy. Moreover, by concluding for the first time that a wireline video distribution service with a single editorial voice need not obtain a cable franchise, I fear that the majority has opened a Pandora's box that will prove difficult and time-consuming to close.

Legal Issues

The sole legal issue under review is whether ECI must obtain a Title VI cable franchise. ECI must obtain such a franchise if it is a "cable operator" providing "cable service" over a "cable system."

ECI is providing "cable service"

This is not in dispute. As the majority correctly concludes, ECI is clearly providing one-way transmission of video programming to subscribers.[1]

ECI is providing its cable service over a "cable system"

A cable system is:

> a facility, consisting of a set of closed transmission paths and associated

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[1] *See* Communications Act, Section 602(6).

> signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.[2]

ECI's video distribution system meets this standard. First, ECI uses a "set" of transmission paths (some owned, some leased) to transmit its video programming to subscribers. Just like any cable operator, these transmission paths do not change and are dedicated to ECI's exclusive use. Second, these transmission paths are "closed" because they transmit via wires rather than radio waves.[3] Third, these closed transmission paths have "associated signal generation, reception, and control equipment [i.e., ECI's headend equipment] that is designed to provide cable service." Fourth, ECI's service includes video programming and is provided to multiple subscribers within a community.

The conclusion that ECI is operating a cable system is consistent with the Commission's long-standing definition of "cable system" based on technical integration: all technically integrated facilities that provide cable service from a single headend to multiple subscribers are deemed to be a cable system.[4] Rather than apply a straightforward

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2 *Communications Act, Section 602(7).*

3 *See Definition of a Cable System*, 5 FCC Rcd 7638, 7642 (1990).

4 *See Definition of a Cable Television System*, 63 FCC 2d 956, 974 (1977) ("Under the new definition of system, it should be clear that all trunk and distribution cable operating off one headend is a single cable television system"). Given the similarity between the Commission's definition and the definition codified in the 1984 Cable Act, the Commission recently reaffirmed its technical integration standard. *See*

technical integration test, however, the majority gets sidetracked by the fact that ECI leases part of its distribution system from Ameritech. Relying primarily on an inapt analogy to video dialtone, the majority argues that the separation of ownership between headend (ECI) and transmission paths (Ameritech) precludes a finding that ECI is operating a cable system.[5]

The majority's mistaken analogy to video dialtone is based on a failure to distinguish between use of a common carrier's *facilities* and use of a common carrier *platform*.[6] The distinction is critical. Use of a common carrier's *facilities* on a technically integrated basis -- i.e., where a single entity, like ECI, provides programming to subscribers from a single headend over a dedicated set of common

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Roberts v. Houston Division of Time Warner Entertainment Company, L.P., 11 FCC Rcd 5999 at § 15 (1996) (pre-1984 definition based on the "actual technical integration and functional characteristics common to all systems" has not been changed by the 1984 Cable Act, the 1992 Cable Act or the 1996 Telecommunications Act).

[5] Video dialtone, as the majority notes, was a Commission-created framework that permitted telephone companies, consistent with the telco-cable cross-ownership ban, to offer a common carrier platform to multiple independent video programmers on a non-discriminatory basis. (Thus, while the Commission developed video dialtone as a way to permit telephone companies to participate in the video marketplace notwithstanding the statutory ban, today's majority has no such excuse. ECI is under no statutory restrictions preventing it from entering the video programming marketplace.) Consumers who subscribed to the common carrier's video dialtone platform could then access any and all of the programming available from multiple independently-owned headends through the telephone company's switched network.

[6] This is also at the root of the majority's mistaken reliance on an early legislative draft of what evolved into the open video system framework. The cited legislative history discusses only whether a programmer on a common carrier platform should be deemed a cable operator.

carrier wires -- has always been considered a cable system. Indeed, that is "channel service," a common carrier offering that requires the programmer leasing capacity to obtain a Title VI cable franchise.[7] By contrast, a common carrier video *platform* like video dialtone refers to a common carrier service on which multiple independent programmers may obtain carriage on a non-discriminatory basis and provide video programming directly to consumers. As the Commission recently stated, our rules required video dialtone service:

> to include at a minimum, a basic common carrier platform available to multiple video programmers on a non-discriminatory basis, *and a means by which end-user subscribers could access any and all of the video programming offered.*[8]

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[7] *See NCTA v. FCC*, 33 F.3d 66, 71 (1994); *Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465 (D.C. Cir. 1989).

[8] *Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc.*, 12 FCC Rcd 6901 at §§ 23-24 (1997) (emphasis added) (declining to find that MFS's video transport service was a common carrier platform where MFS provided no evidence that multiple programmers could make uninterrupted use of its facilities to provide service to end user subscribers). *See also In the Matter of Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 at §§ 29, 89 (1992) ("*Second Video Dialtone Report and Order*") ("The basic common carrier platform should provide multiple video programmers nondiscriminatory access to a common carrier transmission service that will enable them to deliver, *and consumers to receive*, video programming and video programming services") (emphasis added).

Put differently, if channel service is like cable, a common carrier video platform is more like a video version of a common carrier "900" service through which multiple independent entities can obtain non-discriminatory access to consumers through the common carrier's network.

This distinction is significant and demonstrates why ECI is clearly operating a cable system. First, as a technical matter, ECI's system resembles a cable system and not a common carrier platform. In a key passage regarding video dialtone cited by the majority as supporting its conclusion, the D.C. Circuit stated:

> [w]here the "closed transmission paths" and "associated" headend equipment are owned and controlled by different entities (as in video dialtone), *and where different configurations of equipment would be used to move video programming from the different providers to the different customers*, the concepts of a single, integrated system and unified control are not present.[9]

In other words, in video dialtone there was no "single, integrated system and unified control" not simply because different entities owned the headends and closed transmission paths, but because the presence of multiple headends meant that no technically integrated "system" was used to deliver programming to subscribers (i.e., a different mix of facilities might be used to deliver video programming to each subscriber). This is nothing like ECI's technically integrated system, where there is only *one headend*

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[9] *NCTA*, 33 F.3d at 74 (emphasis added).

"associated" with the closed transmission paths, and *the same configuration of equipment* is used to deliver video programming to subscribers *from a single provider.*[10]

Nor can ECI's technically integrated system be shoe-horned into the video dialtone model because Ameritech may have additional fibers in the ground that could accommodate other programmers. Unlike video dialtone, Ameritech's service does not provide a common vehicle for multiple programmers to reach subscribers to the platform. Rather, Ameritech provides dedicated transmission paths -- ready-made channel service, if you will -- for single programmers operating from single headends to reach only their own customers. Every ECI customer receives programming only from ECI's headend; every customer of a different service would receive programming from only that service's headend.[11] The requirement that multiple

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[10] The unified nature of ECI's facility is not altered by the fact that ECI owns part of the facility and leases part of it from Ameritech. As the majority acknowledges, in codifying the definition of "cable system" in 1984, Congress intentionally omitted the Commission's previous requirement that all portions of a cable system be under common ownership or control. This interpretation is consistent with the common carrier exemption from the definition of "cable system," which states that a common carrier facility regulated pursuant to Title II is not a cable system "except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers . . ." Section 602(7)(C).

[11] *The majority's assertion (at para. 58) that the presence of additional strands in Ameritech's fiber bundles means that the facilities used to serve ECI "do not benefit any particular programming provider" is completely baseless. The dedicated capacity that ECI leases benefits only ECI. Further, given the high cost of fiber installation compared to the cost of fiber, companies commonly lay more fiber than present demand requires. If the mere presence of additional fibers meant that none of the dedicated fibers could be attributed to a particular programmer, our rules would be easily evaded.*

programmers be able to reach consumers was a key aspect of video dialtone:

> [W]e believe that such a requirement will prevent a telephone company from seeking to present ordinary channel service to a single video programmer and claiming that such a construct is a sufficient video dialtone "platform" to enable it to provide to video programmers unregulated enhanced services related to video programming.[12]

In fact, there is no guarantee that residents in multiple dwelling unit buildings ("MDUs") served by ECI will even have a choice *among* separate service providers that may use Ameritech's service. At best, Ameritech's service only gets programmers as far as a junction box within an MDU.[13] An MDU owner that selects ECI or a different provider (possibly for a share of the revenues),

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[12] *Second Video Dialtone Report and Order*, 7 FCC Rcd 5781 at § 30. *See also In the Matter of Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 244 at § 33 (1994) (without sufficient capacity to permit multiple video programmers to provide service to consumers, "it is not clear that video dialtone service would differ materially from channel service, which telephone companies were able to provide to cable operators even before we adopted the video dialtone framework").

[13] Thus, the majority's assertion (at para. 55) that "Ameritech also has capacity to serve multiple customers in the same MDUs" is not true. Ameritech's network strands service providers at a junction box within an MDU. Any programmer using Ameritech's service that wishes to obtain access to MDU residents must deal separately with the private property owner. *See* MFS, 12 FCC Rcd 6901 at § 24 (no common carrier platform was established where system ended at a point of presence within a building).

could prevent all other programmers using Ameritech's service from reaching MDU residents. Thus, an MDU resident may have no choice at all among service providers -- it could be ECI or nothing.[14]

Second, ECI exercises the editorial discretion of a cable operator, not of a programmer on a common carrier platform. A traditional cable system is a "closed" system -- a single cable operator (using channel service or otherwise) generally has broad editorial control over what programming is carried on its system.[15] A common carrier platform, on the other hand, is an "open" system -- no one has control over the system's editorial content because the common carrier must provide access to all programmers on a non-discriminatory basis.[16] ECI's broad editorial discretion to select and package programming, and to exclude others from its dedicated wire, is far more similar to cable service than video dialtone. Indeed, ECI will have even more editorial control than a traditional cable operator since, under the majority's decision, ECI has no leased access, must-carry or

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[14] ECI's offer to make its drop wires available to its competitors (i.e., trade the drops back and forth), while commendable, may therefore be irrelevant.

[15] *See Second Video Dialtone Report and Order*, 7 FCC Rcd 5781 at § 15 ("hallmarks of acting as a traditional cable operator" include: (1) selecting and packaging programming for sale to consumers; and (2) exercising editorial control over, or possessing an ownership interest in, video programming provided directly to consumers). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("cable operators exercise a 'significant amount of editorial discretion regarding what their programming will include'").

[16] Under certain specified circumstances, Title VI also denies cable operators the right to exclude others from its system (e.g., commercial leased access, must-carry and PEG access channels).

public, educational and governmental ("PEG") access obligations.

Third, unlike a common carrier platform, it is feasible as a practical matter to regulate ECI's system as a cable system. As the *NCTA* court pointed out, it would be non-sensical to apply many of the strictures of Title VI to a common carrier platform like video dialtone.[17] For instance, with multiple programmers providing service from separate headends over a single wire, it is difficult to imagine how the system would comply with the basic service tier, commercial leased access and must-carry requirements. No such practical problems present themselves with ECI. As with channel service, it is not difficult to determine which programmer must comply with the requirements of Title VI because there is only one entity providing programming to ECI's customers: ECI.

Finally, the majority asserts that, even if ECI's system constitutes a "cable system," it qualifies for the private cable exemption reserved for "a facility that serves subscribers without using any public rights of way."[18] The majority argues that it is Ameritech, not ECI, that is using the public rights-of-way. This argument can be dismissed quickly. Under Title VI, the issue is not whether a particular *entity* uses the public rights of way, but whether *the facility* uses the public rights of way.[19] Were it otherwise,

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[17] *See NCTA*, 33 F.3d at 75.

[18] *See* Section 602(7)(B).

[19] The majority's reliance on *AT&T Communications of the Southwest, Inc. v. City of Austin, Texas*, 975 F. Supp. 928 (W.D. Tex. 1997) is therefore misplaced. That case arose under Title II, not Title VI, and dealt with the issue of whether a non-facilities-basedreseller of a telephone company's local exchange service uses the public rights-of-

traditional channel service would not have required a Title VI franchise. As described above, ECI owns part of its video distribution facility and leases part of it, but there can be no question that this unified, end-to-end *facility* uses the public rights of way. The majority's argument cannot withstand scrutiny under the plain language of the Act.[20]

ECI is a "cable operator"

Section 602(5) defines a "cable operator" as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

Although the majority does not reach this issue, I believe that ECI likely satisfies both tests by which an entity

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way. But under Title VI, the issue is whether a technically-integrated *facility* uses the public rights-of-way. Moreover, ECI is not merely reselling a service already offered by Ameritech, but is leasing dedicated video transport facilities in order to provide its own programming service to consumers.

[20] In any event, it is those who select the programming and designate where it should be delivered who are using the public rights-of-way for purposes of Title VI. See NCTA, 33 F.3d at 71-72 (telephone company that merely serves as transparent conduit for the programming of others is not engaged in the "transmission" of video programming under Title VI). Indeed, the majority acknowledges (at para. 53) that it is the programmers using common carrier facilities that "generate and control" the signals from their headend to their subscribers.

can be deemed a cable operator. First, ECI may own a "significant interest" in the facilities that constitute its cable system.[21] Although Ameritech owns the closed transmission paths in the public rights of way, ECI owns all of the signal generation, reception, and control equipment, as well as the portion of the closed transmission paths at each MDU (including all inside wiring, amplifiers, splitters, lockboxes, etc.). At the very least, this raises a substantial question of fact that cannot be resolved on the current record.

Moreover, ECI controls or is responsible for (through its ownership and lease arrangements) the management and operation of the cable system. ECI decides how many channels the cable system will have and what programming services will be carried. ECI selects the MDUs that will be served, sets the price for and markets the service, and bills subscribers for the service. If a subscriber wants to initiate service or has a service outage, he or she would call ECI, not Ameritech. Ameritech essentially serves as a transparent conduit, transporting video signals at ECI's direction from ECI's headend to its customers. As the *NCTA* court found, where an entity is using the facilities of a common carrier to transmit video programming to subscribers, it is the transmitting entity and not the common carrier that is engaged in activity covered by Title VI.[22]

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[21] Under the Commission's rules, a "significant interest" is a cognizable interest for attributing interests in broadcast, cable and newspaper properties pursuant to Sections 73.3555, 73.3615, and 76.501. See 47 C.F.R. § 76.5(bb).

[22] *NCTA*, 33 F.3d at 71. *See also TBA v. Ohio Bell Telephone Company*, FCC 97-64 (March 4, 1997) at § 12 (common carrier that simply processes incoming transmissions and passes those signals on to their designated destinations does not control the transmitted signals).

Policy Considerations

Although this case primarily turns on a legal interpretation of the Communications Act, several policy considerations also argue against granting ECI's petition.

First, today's decision upsets the careful regulatory balance struck by Congress in the Communications Act. The Act establishes several distinct methods for entering the video marketplace, each with its own specific benefits and obligations. Even under the "reduced regulatory burdens" of the open video system ("OVS") model,[23] Congress imposed various Title VI obligations including must-carry, PEG and the payment of a gross revenue fee to local authorities. ECI, by contrast, will have virtually all of the benefits of being a cable or OVS operator with none of the Title VI obligations. Regardless of how much we want to promote competition in the multichannel video marketplace, we cannot do so by creating loopholes in the regulatory scheme created by Congress.

Second, today's decision undermines the vital franchising role that Title VI reserves for local governments. Under Title VI, local franchising authorities can ensure that the needs of their particular communities are met, such as requiring that all neighborhoods be served and that capacity for PEG access be provided. We should not lightly deprive local governments of the ability to protect their communities in this regard, and certainly not without a fuller analysis than is presented here.

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[23] *See* S. Rep. 104-230, 104th Cong. 2d Sess. at 177 (Feb. 1, 1996).

Third, today's decision poses a substantial risk of unintended consequences. For instance, I see no legal basis for limiting the decision solely to entities that want to serve MDUs. If ECI's system is not a "cable system," it would not be a cable system whether it serves MDUs or single family homes. The next case before us could be an overbuild of an entire cable franchise area that would look exactly like a cable system in every respect -- except that no Title VI obligations would apply.

Moreover, the next case may not involve a small entity like ECI; telephone companies, incumbent cable operators and others have already expressed an interest in obtaining similar treatment if ECI's petition is granted. We should not underestimate the incentive that today's decision gives companies to artificially restructure their ownership arrangements to evade Title VI regulation. Unfortunately, by failing to articulate a clear legal or factual standard of review for future cases, the majority has done little to discourage such behavior.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 98-2729, 98-2901, 98-2940, 98-3064,
98-3078, 98-3079, 98-3267 & 98-3474

CITY OF CHICAGO; TEXAS COALITION OF CITIES ON FRANCHISED UTILITIES ISSUES; CITY OF ST. LOUIS; CHARTER TOWNSHIP OF MERIDIAN and CITY OF EAST LANSING, MICHIGAN; ALLIANCE FOR COMMUNICATIONS DEMOCRACY, ALLIANCE FOR COMMUNITY MEDIA, and CHICAGO ACCESS CORPORATION; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (NATOA); and MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

and

21ST CENTURY TELECOM GROUP, INC.; MICHIGAN COALITION TO PROTECT PUBLIC RIGHTS OF WAY FROM TELECOMMUNICATIONS ENCROACHMENTS; and GREATER METRO TELECOMMUNICATIONS CONSORTIUM,

Intervening Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

and

ENTERTAINMENT CONNECTIONS, INC.; RCN TELECOM SERVICES, INC.; and WEDGEWOOD COMMUNICATIONS COMPANY,

Intervening Respondents.

Petitions for Review of an Order
of the Federal Communications Commission.
No. 98-111

Before the Court on Petitions for Rehearing
and Petitions for Rehearing *En Banc*

DECIDED March 22, 2000

PER CURIAM. The court's opinion was issued in these consolidated cases on December 7, 1999. Subsequently, numerous petitions for rehearing and petitions for rehearing *en banc* were filed. The original panel has unanimously voted to deny rehearing. A vote was requested on the petitions for rehearing *en banc*. A majority of the judges entitled to vote voted to deny the petitions for rehearing *en banc*. Circuit Judges Rovner, Diane P. Wood, and Williams voted to grant rehearing *en banc*.

Accordingly, the petitions for rehearing and rehearing *en banc* are DENIED. The panel, however, amends its opinion of December 7, 1999, as follows:

The last two sentences of the first paragraph of the opinion are deleted and replaced by:

> After the FCC ruled in the ECI case, several petitions for review were filed in various circuits. The first one filed was in this circuit, and after the FCC lodged the record here the remaining petitions were transferred to us under 28 U.S.C. § 2112(a)(5). We consolidated all of the petitions for decision.

TITLE VI - CABLE COMMUNICATIONS

Part I - General Provisions

Section 601, 47 U.S.C. § 521 (Purposes)

The purposes of this title are to –

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promotion competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Section 602, 47 U.S.C. § 522 (Definitions)

For the purpose of this title –

* *

(2) the term "affiliate", when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership to control with, such person;

* * *

(5) the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement the management and operation of such a cable system;

(6) the term "cable service" means –

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

(7) the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility systems;

* * *

(10) the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

* * *

(15) the term "person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

* * *

(18) the term "State" means any State, or political subdivision, or agency thereof;

* * *

(20) the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

Section 602(6), 47 U.S.C. § 522(6) (as enacted Oct. 30, 1984)

(6) the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities

uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

PART III - Franchising and Regulation

Section 621, 47 U.S.C. § 541 (General Franchising Requirements)

* * *

(b)(1) Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(c) Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

* * *

(e) Nothing in this title shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, and which does not use any public right-of-way.

(f) No provision of this Act shall be construed to —

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

PART IV - Miscellaneous Provisions

* * *

Section 636, 47 U.S.C. § 556 (Coordination of Federal, State, and Local Authority)

(a) Nothing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title.

(b) Nothing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title.

(c) Except as provided in section 637, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

(d) For purposes of this section, the term "State" has the meaning given such term in section 3.

* * *

Supreme Court, U.S.
FILED
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No. 99-2038

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Entertainment Connections, Inc., which provides satellite master antenna television service to subscribers in 12 apartment buildings in Michigan, is required to obtain a local franchise under Title VI of the Communications Act, 47 U.S.C. 541(b)(1).

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In the Supreme Court of the United States

No. 99-2038

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A24) is reported at 199 F.3d 424. The opinion and order of the Federal Communications Commission (Pet. App. A27-A107) is reported at 13 F.C.C. Rcd 14277.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1999. Petitions for rehearing were denied on March 22, 2000 (Pet. App. A109-A110). The petition for a writ of certiorari was filed on June 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, no federal statute governed the regulation of cable television. During that time, the Federal Communications Commission began to regulate cable television in conjunction with its statutory duty to regulate broadcasting. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). As federal regulation of cable television evolved, the FCC preempted many forms of local cable regulation, including leased channel regulations and technical standards. *Amendment of Part 76 of the Commission's Rules*, 54 F.C.C.2d 855, 863 (¶ 25) (1975). But the Commission declined to preempt local franchising of cable systems that transmit video programming through coaxial cables buried in public rights-of-way. *Ibid.* (¶ 24).

At the same time, the Commission concluded that distributors of multichannel video programming should not be subject to local franchising if they do not use public rights-of-way to deliver programming. For instance, the Commission preempted local franchising of systems that use multipoint distribution service (MDS), a service that transmits microwave radio frequencies to rooftop antennas for distribution to subscribers in apartment buildings. *Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), on recons., 82 F.C.C.2d 178 (1980), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 669 F.2d 58 (2d Cir. 1982). Similarly, the Commission preempted local franchising of satellite master antenna television (SMATV) systems, which transmit television signals from satellites directly to satellite receiving stations atop apartment buildings. *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 n.3 (1983), aff'd *sub nom. New York State*

Comm'n on Cable Television v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984).

2. In 1984, Congress passed the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), the first comprehensive federal legislation concerning cable television. The 1984 Cable Act created Title VI of the Communications Act. Among other things, Title VI codified the well-established practice of local cable television franchising. It provided that, with limited exceptions, "a cable operator may not provide cable service without a franchise." 47 U.S.C. 541(b)(1). The statute defined a "cable operator" as any person or group "(A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. 522(5). The statute defined a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. 522(7) (1994 & Supp. III 1997).

The 1984 Cable Act expressly excluded certain types of facilities from the definition of "cable system." In particular, the statute made clear that the term "cable system" did not include private cable facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities us[e] any public right-of-way." 47 U.S.C. 522(6)(B) (1988). Thus, under the statute's plain terms, operators of private

cable facilities are exempt from the franchise requirement.[1]

Originally, the private cable exemption applied only to systems serving "multiple unit dwellings under common ownership, control, or management." 47 U.S.C. 522(6)(B) (1988). Congress eliminated that restriction when it amended the Communications Act in 1996. As amended, the statute provides that any "facility that serves subscribers without using any public right-of-way" is exempt from local franchising, even if the facility serves buildings that are not commonly owned, controlled, or managed. 47 U.S.C. 522(7)(B) (Supp. III 1997).

3. Private cable systems were not the only facilities exempted from local cable franchising. In the early 1990s, the FCC determined that the Title VI franchise requirement did not apply to "video dialtone," a new format proposed by the Commission for delivering multichannel video programming. Under the proposed framework for video dialtone, a telephone company would provide unaffiliated video programmers with nondiscriminatory access to a "platform" that they would use to deliver their video services to their respective subscribers. The Commission concluded that neither the telephone company supplying the video dialtone platform nor any programmer using the platform qualified as a "cable operator" subject to local franchise obligations. *Telephone Co.-Cable Television Cross-Ownership Rules*, First Report and Order, 7 F.C.C.R. 300, 324-328 (¶¶ 47-52) (1991), or recons., 7 F.C.C.R. 5069 (1992), aff'd *sub nom. National Cable*

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[1] This Court rejected a claim that the private cable exemption from local franchising violated the Constitution's Equal Protection Clause. *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307 (1993).

Television Ass'n, Inc. v. *FCC*, 33 F.3d 66 (D.C. Cir. 1994) (*NCTA*).

The Commission reasoned that a telephone company providing a video dialtone platform would not be a "cable operator" providing "cable service" because it would not transmit programming of its own choosing, but would merely serve as a conduit for programming selected by unaffiliated programmers. As for those programmers, the Commission found that they would not be "cable operators" because they would not own, control, or manage the video dialtone platform. On review, the D.C. Circuit affirmed the Commission's determination that none of the participants in providing video dialtone service was required to obtain a local franchise. *NCTA*, 33 F.3d at 70-75.[2]

4. The issue in this case is whether the Title VI franchise requirement applies to Entertainment Connections, Inc. (ECI), a SMATV provider that serves approximately 1600 subscribers in twelve apartment buildings in Michigan. Originally, ECI operated a conventional SMATV system. It transmitted its video signal to a separate master antenna television facility, or "headend," at each building it served; and each headend then distributed ECI's video signal to subscribers within that building. As long as ECI provided

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[2] At the time the FCC adopted its video dialtone rules, the Communications Act generally banned cable-telephone company cross-ownership. See 47 U.S.C. 533(b) (1988). The Commission envisioned video dialtone as a method for telephone companies to participate in the provision of cable service without violating the cross-ownership ban, but very few telephone companies ever took advantage of that method. In 1996, Congress rescinded both the cross-ownership ban and the FCC's video dialtone regulations. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1) and (3), 110 Stat. 124.

service this way, its video signal never crossed public rights-of-way, and no local franchising authority asked ECI to obtain a cable franchise. Pet. App. A3.

In 1996, ECI reconfigured its SMATV system to transmit video signals through a single headend. In order to link that headend with the various apartment buildings it serves, ECI entered into a contract to purchase "Supertrunking Video Transport Service" from Ameritech, the incumbent local exchange carrier in Michigan. Ameritech offers this service to video programming providers on a common carrier basis. Under its service contract with ECI, Ameritech conveys ECI's video signal from ECI's headend to the various apartment buildings through fiber optic facilities that traverse public rights-of-way. Ameritech constructed, owns, and manages these transmission facilities. At each building, Ameritech's lines connect to junction boxes, which connect with ECI's interior building drop lines, which in turn connect to the television sets of individual subscribers. Pet. App. A3, A30. The headend and reception facilities that ECI owns or controls are located entirely on private property; they do not encroach on public rights-of-way (*id.* at A31).

After ECI began using Ameritech's video transport service in East Lansing and Meridian Township, Michigan, officials in those two communities informed ECI that it needed to obtain local franchises for its reconfigured SMATV system (Pet. App. A3). In response, ECI filed a motion with the FCC requesting a declaratory ruling that ECI was not a "cable operator" subject to the franchise requirement of Title VI (*id.* at A4).

5. After receiving and reviewing extensive comments on the subject from interested parties (summarized at Pet. App. A36-A50), the FCC issued a declaratory ruling that ECI need not obtain a cable

franchise under Title VI. The Commission relied on its previous determination in the video dialtone context that "the term 'cable operator' does not encompass an entity that maintains reception and transmission equipment wholly on private property and that transmits its video signals through the public rights-of-way solely by means of a local exchange carrier's facilities that are made available on a common carrier basis." *Id.* at A71. The Commission noted that in ECI's case, as in video dialtone, two separate entities control the headend and transmission facilities, and the owner of the transmission facilities makes them available to multiple video programming providers. Under those circumstances, where "the concepts of a single, integrated system and unified control are not present," the Commission reasoned that ECI, like a programmer using a video dialtone platform, lacks sufficient ownership or control of a cable system to qualify as a "cable operator" under Title VI. *Id.* at A73-A75 (quoting *NCTA*, 33 F.3d at 74).

As an alternative basis for its declaratory ruling, the Commission determined that ECI qualified for the "private cable" exemption from local franchising because ECI's facilities did not use any public rights-of-way to serve subscribers (Pet. App. A81-A82). While the Commission acknowledged that "ECI's signal moves across public rights-of-way to reach its subscribers," it observed that "Ameritech, not ECI, * * * uses the rights-of-way" to transport ECI's programming. *Id.* at A81. The Commission concluded that ECI did not "use" rights-of-way merely by hiring Ameritech to transport ECI's signal, since ECI's own facilities did not use any rights-of-way. *Id.* at A82.

In ruling that ECI is not subject to local franchising requirements, the FCC emphasized that its decision is

"expressly limited to the facts before the Commission as presented by ECI." Pet. App. A91. Specifically, the Commission identified seven factors on which it based its conclusion:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.

Ibid.

6. Various parties filed petitions for judicial review of the FCC's decision. Those petitions were consolidated in the Seventh Circuit. A divided panel of that court denied the petitions for review. Pet. App. A1-A24. The court, noting the ambiguous statutory definition of "cable operator" and the specific characteristics of the system used to transmit ECI's programming, held that the FCC had reasonably concluded that "there is no entity which owns a significant interest in the system or who controls, manages, or operates the system as a whole." *Id.* at A14. Consequently, the court upheld the FCC's determination that ECI is not a "cable operator" under Title VI. The court also found ambiguity in statute's definition of "cable system", which excluded private cable facilities that provide

service "without using any public right-of-way." 47 U.S.C. 522(7)(B) (Supp. III 1997). The court concluded that it is unclear "what is meant by 'using' the public right-of-way." Pet. App. A13. Because that term could reasonably be construed to entail construction of cable facilities on public rights-of-way, "it is reasonable to conclude that ECI has not 'used' the public right-of-way." *Id.* at A16. On that basis, the court upheld the Commission's finding that ECI qualifies for the private cable exemption from local franchising.[3]

The dissenting judge disagreed with the majority's conclusion that the Title VI provisions governing local franchising are ambiguous. In her view, the plain language of those provisions compels the conclusion that ECI must obtain a franchise to provide its video service. Pet. App. A18-A24 (Rovner, J., dissenting).

On March 22, 2000, the Seventh Circuit denied several petitions for rehearing and rehearing en banc. Three judges voted for rehearing en banc.

ARGUMENT

1. Petitioners assert that the FCC's decision in this case produced a "radical restructuring of Title VI." Pet. 11. But there was nothing radical about the Commission's declaratory ruling on ECI's franchise obligations. By expressly confining that ruling to the specific facts presented by ECI, the Commission merely concluded that the novel facts presented properly fit within a very narrow extension of franchising

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[3] The panel majority made clear that it would have reached the same result in this case even if it were not required to defer to the FCC's statutory interpretation: "[W]hile the agency interpretation is, of course, not the only possible one, it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination." Pet. App. A8.

exemptions that have been in place for many years. Given the limited effect of the FCC's ruling, this case does not warrant this Court's review.

Contrary to petitioners' suggestion, exemptions from local cable franchising are nothing new. In the 1980s, the courts affirmed the FCC's exemption of MDS and SMATV systems from local franchising obligations. See *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984) (affirming SMATV exemption); *New York State Comm'n on Cable Television* v. *FCC*, 669 F.2d 58 (2d Cir. 1982) (affirming MDS exemption). Then, in the 1990s, the D.C. Circuit upheld the FCC's ruling that Title VI franchise requirements did not apply to video dialtone. *NCTA*, 33 F.3d at 70-75. Thus, as the court below rightly recognized, "the exemption from local franchise requirements of some technology which does, in fact, provide cable programming is not a novel nor a static one. Nor does the ever-evolving technology allow the boundaries which are drawn to always be clear and distinct." Pet. App. A12.

The Commission's exemption of ECI from local franchising represented a minor extension of existing franchise exemptions in response to a newly created system for video programming distribution. As the court below observed, ECI's system shares several attributes of SMATV and video dialtone systems, which "have a history of exemption from the [franchise] requirement." Pet. App. A10-A11. The Commission identified a number of specific ways in which ECI's system resembles a video dialtone arrangement:

> (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between

> them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi) there is capacity to serve several other programming providers.

Pet. App. A91. In light of these factors, and in view of ECI's commitment to make its drop lines available to other programming providers, the Commission decided that ECI's system, like video dialtone, is not subject to the local franchising requirement of Title VI.

Petitioners incorrectly claim that the fact-specific declaratory ruling in this case will "exempt a large subclass of wireline cable operators" from local franchising. Pet. 8. By its own terms, the FCC's ruling here is "expressly limited to the facts before the Commission as presented by ECI." Pet. App. A91. Petitioners do not identify any other provider whose video programming distribution facilities share the distinctive characteristics of ECI's system. They suggest instead that cable operators may try to evade local franchising by reconfiguring their systems to mirror ECI's operations. It is, however, implausible to speculate that cable operators that own and control their own transmission lines will abandon those facilities in favor of a video transport service offered by a telephone company, particularly when that service is made available on a common carrier basis to multiple video programming providers. At bottom, this case involves a fact-bound declaratory ruling about a video programming provider whose system appears to be

quite unusual. Because that ruling is unlikely to have far-reaching consequences, further review is not warranted.

2. Petitioners also incorrectly assert that the decision below conflicts with *City of Austin* v. *Southwestern Bell Video Services, Inc.*, 193 F.3d 309 (5th Cir. 1999), cert. denied, 120 S. Ct. 1708 (2000). In *City of Austin*, as in this case, the court affirmed a ruling that the local franchising requirements of Title VI do not apply to a video programming distribution system when: (1) the headend and transmission facilities are controlled by two different entities; and (2) the transmission facilities are controlled by a common carrier that offers its video transport service to multiple video programming providers. The only apparent difference between the systems in these two cases is that, in *City of Austin*, the two entities that owned parts of the system were affiliates of the same parent company. Acknowledging that affiliation, the Fifth Circuit nonetheless found that, because the two companies maintained separate and independent operation of their respective facilities, no single entity in that case controlled, managed, or owned a significant interest in a "cable system." *City of Austin*, 193 F.3d at 311-312. The Fifth Circuit's reasoning in *City of Austin* would not dictate a different outcome here. If anything, the franchising exemption affirmed by the Fifth Circuit in *City of Austin* is broader than the declaratory ruling at issue here; and this Court saw no need for further review of the Fifth Circuit's decision. 120 S. Ct. 1708 (2000). There is even less reason to review the more circumscribed ruling in this case.

3. In any event, the court below correctly decided this case. The scope of the Title VI franchising requirement is not entirely clear, because the defini-

tions of "cable operator" and "cable system" are ambiguous in respects that are relevant here. The court accordingly deferred to the FCC's reasonable interpretation of these statutory terms. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U. S. 366, 396-398 (1999) (deferring to FCC on interpretation of Communications Act); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

Contrary to petitioners' assertion (Pet. 12), neither the Commission nor the court below found that ECI is exempt from franchising simply "because it does not have complete ownership" of all the components of its cable system. Pet. App. A14. As the court correctly found, Ameritech's separate ownership of the system's transmission facilities is "an element, but not the sole basis, of the FCC decision." *Ibid.* That decision rests on a number of factors. Among other things, the Commission found that the facilities Ameritech uses to transport ECI's signal can also be used to serve other video programming providers. The Commission further noted that Ameritech offers its video transport service on a common carrier basis. These and other factors, in combination with Ameritech's separate ownership and control of the transmission facilities, persuaded the Commission and the court below that "there is no entity which owns a significant interest in the system or who controls, manages, or operates the system as a whole." *Ibid.*

These additional factors distinguish ECI's operations from channel service. Under a channel service arrangement, a telephone company builds a transmission facility to a cable operator's specifications and dedicates that facility exclusively to transmission of the cable operator's programming. See Pet. App. A76-A77; *New York Tele. Co.*, 10 F.C.C.R. 11548, 11552 n.18 (1995).

The Commission had previously indicated that a cable operator using channel service must hold a local cable franchise pursuant to Title VI. See *Telephone Co.-Cable Television Cross-Ownership Rules*, Second Report and Order, 7 F.C.C.R. 5781, 5787 n.21 (1992). ECI's system, however, differs from channel service in critical respects. As the court below observed, the facilities used by Ameritech to provide service to ECI were, "for the most part, not constructed at ECI's request." Pet. App A15. The "large majority" of those facilities "were constructed by Ameritech prior to marketing its Supertrunking video service" (*id.* at A77). Even the few facilities that Ameritech constructed in response to ECI's request for service are not dedicated to ECI's exclusive use. In marked contrast to a channel service arrangement, Ameritech is offering to provide video transport service to other video programming providers over the same facilities that it currently uses to serve ECI. *Id.* at A77-A78. These fundamental differences between ECI's system and channel service justified different regulatory treatment of ECI under Title VI. Cf. *NCTA*, 33 F.3d at 74-75 (differentiating between video dialtone and channel service). Indeed, the closest parallel to ECI's system is not channel service, but video dialtone. When that service was in existence, it was not subject to Title VI franchise requirements, as the D.C. Circuit concluded in *NCTA*, 33 F.3d at 70-75. That decision reflects a reasonable analysis of the uncertain boundaries of the local franchising requirement under Title VI, an analysis that the court below essentially tracked in this case. Further review is not warranted.

Although petitioners concede that ECI's system is "similar" to video dialtone, they assert that "Congress explicitly rejected" video dialtone "in favor of a less

radical open video system" when it amended the Communications Act in 1996. Pet. 24. But petitioners offer no evidence that the 1996 amendment reflected congressional disapproval of the D.C. Circuit's ruling in *NCTA*. Presumably, if Congress had disagreed with the court's statutory interpretation in *NCTA*, it would have amended the definitions of "cable operator" and "cable system" to make clear that Title VI franchising requirements would apply to systems resembling video dialtone. Instead, the 1996 amendments *reduced* the scope of local franchising by expanding the private cable exception to the definition of "cable system."[4]

Finally, there is no merit to petitioners' claim (Pet. 24-28) that the court below should not have deferred to the FCC's statutory interpretation. Petitioners point out that judicial deference is inappropriate when an agency interprets a statute that it does not administer. Pet. 25 (citing *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990)). In this case, however, the FCC construed provisions that define terms used throughout Title VI of the Communications Act. Various provisions of Title VI direct the Commission to regulate "cable operators" and "cable systems." See, *e.g.*, 47 U.S.C. 533(f)(1)(B) (directing the FCC "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest"). To discharge these regulatory re-

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[4] Moreover, contrary to petitioners' suggestion, it is unlikely that Congress viewed video dialtone as a "radical" concept. At the time Congress eliminated the FCC's video dialtone regulations in 1996, virtually no video dialtone systems existed. In all likelihood, Congress created a new regulatory framework to replace video dialtone simply because so few entities had shown any interest in the concept.

sponsibilities, the Commission necessarily must construe the statutory definitions of the terms "cable operator" and "cable system." Therefore, the Commission's interpretation of these statutory definitions is entitled to judicial deference.

In any event, the court below made clear that it would have reached the same conclusion even without deference to the FCC's statutory construction: "[W]hile the agency interpretation is, of course, not the only possible one, it is one which we are now convinced we would arrive at ourselves, were we the ones making the original determination." Pet. App. A8. The court's analysis of the Title VI franchising requirement in this case is fully consistent with decisions rendered by other courts on this subject. See *City of Austin*, 193 F.3d at 311-312; *NCTA*, 33 F.3d at 70-75. Most importantly, the court's reading of the relevant statutory provisions is reasonable. The statute's definition of "cable system" refers to "a set of closed transmission paths and associated signal generation, reception, and control equipment." 47 U.S.C. 522(7) (1994 & Supp. III 1997). Because Ameritech's "closed transmission paths" can be used by multiple entities to distribute video programming, it was reasonable for the Commission and the court to conclude that Ameritech's "closed transmission paths" could not really be "associated" with the signal generation and reception equipment of any single video programming provider.

In sum, the decision below affirms an agency's reasonable interpretation of ambiguous statutory language in a very limited factual context. There is no conflict of appellate decisions or other reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 99-2038

In the
SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY TO OPPOSITION OF FEDERAL RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 the Corporate Disclosure Statement was filed June 20, 2000, with the Petition for Writ of Certiorari.

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Argument

1. The Federal Respondents concede that the Commission's interpretation below enlarges the statutory exemption from Title VI's local franchising requirement in Section 602(7)(B), but they invite the Court to ignore the Commission's enlargement as only "a minor extension." At page 10 of their brief in opposition they say:

> The Commission's exemption of ECI from local franchising represented a minor extension of existing franchise exemptions in response to a newly created system for video programming distribution.

But the exemptions in Section 602(7) are, after all, statutory, and the agency lacks the discretion to narrow the statute's applicability in the absence of a forbearance provision analogous to that in Section 10 (Competition in Provision of Telecommunications Service), 47 U.S.C. § 160, which applies only to telecommunications carriers and services and does not apply to cable service. Moreover, the Commission's attempt below to exempt such systems stands on less solid ground than even its attempted forbearance – which this Court rejected in *MCI* v. *AT&T,* 512 U.S. 218, 231-32 (1994) -- exempting carriers from the so-called filed-rate doctrine, prior to the enactment of Section 10. Here the rôle that the purported cable exemption would play has significant implications for inter-governmental jurisdiction beyond the scope of the Commission's own regulatory jurisdiction. As

petitioners point out in their petition at 3, one of Congress' overriding concerns in enacting the Cable Act was

> to ... provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems.

H.Rpt. 98-934 to accompany H.R. 4103 (The Cable Franchise Policy and Communications Act of 1984) at 22 (1984); *see also id.* at 22; Section 601 (Purpose), 47 U.S.C. § 521, particularly subsections (1) and (3), printed in Pet. App. at A111. This case is not simply one of an agency's renouncing its own statutory jurisdiction on the margin; for the effect of the construction below is to tinker with Congress' purposeful legislative delineation of the authority of "state and local governments to regulate cable systems." H.Rpt. 98-934, *supra.*

Exemption of these small cable systems was a policy function that Congress did not delegate to the agency but rather embodied in the inter-governmental "delineation" in the statute itself. The absence of any delegation at all to the agency of exemptive authority precludes the implication of any delegation to the agency of authority to exempt cable operators from the local-franchise requirement in Section 621(b). Particularly is this so where Congress expressly negated any implication of the grant of pre-emptive power. *See* Sections 636 of the Cable Act and Section 601(c) of the Telecommunications Act of 1996, discussed below at **6**.

For the courts to accord the Commission a delineative rôle would contradict Congress' expressed intent for the Act "to ... provide and delineate *within Federal legislation* ... the respective authority of Federal, state and local governments to regulate cable systems." H.Rpt. 98-934 at 22 (emphasis supplied). The Commission majority recognized at the time that it was balancing "important issues surrounding dual federal-local jurisdiction under the Communications Act", but it justified its disregard of Congress' specific language as advancing its own "commitment to ensure competitive opportunity while safeguarding the discretion and responsibilities of local officials." Pet. App. at A94. Under the statutory scheme it was not within the Commission's prerogative to balance its commitment to its own competitive policies against the statutory, inter-governmental allocation of regulatory responsibility by Congress. A general competitive policy simply does not override specific statutory provisions. *Medtronic* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Group*, 505 U.S. 504, 517 (1992).

The Court should not accept the government's invitation here to overlook the "minor extension" as insignificant. The commissioners themselves recognized below that the agency's "minor" extension is of major significance. As Commissioner Tristani points out in her dissent

> [T]oday's decision poses a substantial risk of unintended consequences.... I see no legal basis for limiting the decision solely to entities that want to serve MDUs. If

> ECI's system is not a "cable system," it would not be a cable system whether it serves MDUs or single family homes. The next case before us could be an overbuild of an entire cable franchise area that would look exactly like a cable system in every respect – except that no Title VI obligations would apply.
>
> [T]elephone companies, incumbent cable operators and others have already expressed an interest in obtaining similar treatment if ECI's petition is granted. We should not underestimate the incentive that today's decision gives companies to artificially restructure their ownership arrangements to evade Title VI regulation.

Pet. App. at A107. The majority's opinion essentially concedes the potential danger, admitting that "In granting ECI's motion for a declaratory ruling, we are cognizant that other similarly-situated operators have embraced the same interpretation as ECI." Pet. App. at A91. It is "cognizant" that its decision would exempt ECI from compliance "with all of a cable operator's statutory obligations" under Title VI. Pet. App. at A29. It bravely asserts, however, that "the instant decision is expressly limited to the facts before the Commission...." It then identifies seven such facts, the first of which is "absolute separation of ownership" between the cable operator and the common carrier providing the video transport "and ... nothing more than the carrier-user relationship between them". Pet. App. at A91.

The inefficacy of the "purple cow" limitations the Commission thought necessary in paragraph 73 is demonstrated by the fact that a U.S. District Judge one month later applied the Commission's "minor extension" to a case in Austin, Texas, whose population exceeds a half million, where the cable operator and the carrier were sister subsidiaries of Southwestern Bell Corporation. *See City of Austin* v. *SWBV,* 1998 U.S. Dist. LEXIS 16332, 16333 (W.D. Tex. 1998), *aff'd,* 193 F.3d 309 (5th Cir. 1999), *cert. denied,* 120 U.S. 1708 (2000). Southwestern Bell is now the second largest telephone company in the country, operating in more than two dozen states. The federal respondents' formulation of the question presented implies that the regulation of only a twelve-building cable system in Michigan is at stake. Br. at 1. But as a result of the structure of Title VI, which regulates only cable operators as defined, the district judge's decision would seem to give any cable subsidiary of Southwestern Bell – or any other telephone company – anywhere in the country a means to evade the consumer-protection and other regulatory provisions of Title VI. These are the very "significant additional consequences" that the Commission majority acknowledged in paragraphs 3 and 4 of the Commission's order (Pet. App. at A29) and found important enough to attempt to forestall – unsuccessfully as it turns out – by the "purple cow" limitations in paragraph 73 of the order. *Id.* at A91. As a result, such operators are no longer obligated "to comply with ... a cable operator's statutory obligations." *Id.* at A29.

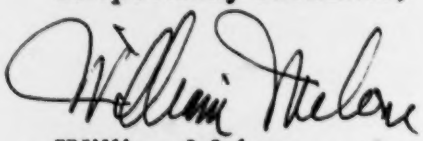
2. This case presents a more subtle *Chevron* issue than that addressed under Point 3 of the government's brief at 12-13 and 15-16, because here both the federal and state agencies were assigned administrative responsibilities by Congress. *See* Point III of the petition at 24-28. In the 1984 Act Congress "continued to rely on local franchising as the *primary* means of regulation." *Time-Warner Entertainment Co.* v. *FCC*, 320 U.S.App.D.C. 294, 300, 93 F.3d 957, 963 (1996) (*per curiam*) (emphasis supplied), *citing* H. Rpt. 98-934 at 19 (1984). Congress cannot reasonably be understood to have given the FCC, as the "secondary" regulator, any discretion over the "primary" regulatory responsibilities of the local governments. For this reason, the instant case was not an appropriate case for the court below to accord judicial deference to an aliteral agency interpretation of the statute, which interpretation moreover violated the express limitations on agency pre-emption in Sections 636 of the Cable Act (Coordination of Federal, State, and Local Authority), 47 U.S.C. § 556, and Section 601(c) (Federal, State, and Local Law) of the 1996 Act, 47 U.S.C. § 152 nt. Unlike Section 224 of the Communications Act, 47 U.S.C. § 224, which gives the Commission jurisdiction over the attachment of cable lines to utility poles in default of the exercise of state jurisdiction, here only the non-federal jurisdictions can issue franchises that satisfy the requirement in Section 621(b) of the Cable Act. The FCC cannot issue local franchises, and it cannot relieve the operators of that statutory requirement by forbearance. Yet that is the effect of its interpretation

of a provision that Congress gave it no power to administer and an implied pre-emptive effect that Congress expressly withheld.

Conclusion

The gaping hole that the Commission's "minor extension" leaves in Title VI's comprehensive plan for inter-governmental regulation in the interest of cable subscribers urgently warrants review by this Court of the decisions below.

Respectfully submitted,



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